

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

WISCONSIN RESOURCES PROTECTION  
COUNCIL, CENTER FOR BIOLOGICAL  
DIVERSITY, and LAURA GAUGER,

Plaintiffs,

v.

Case No. 11-cv-45

FLAMBEAU MINING COMPANY,

Defendant.

VIDEOTAPE EVIDENTIARY DEPOSITION

ELIZABETH A. DAY

Madison, Wisconsin  
April 18, 2012

Peggy S. Christensen, RPR, CRR, CCP  
Registered Professional Reporter

1 VIDEOTAPE EVIDENTIARY DEPOSITION of ELIZABETH A. DAY,  
2 a witness of lawful age, taken on behalf of the  
3 Defendant, wherein Wisconsin Resources Protection  
4 Council, et al. are Plaintiffs, and Flambeau Mining  
5 Company is Defendant, pending in the United States  
6 District Court for the Western District of Wisconsin,  
7 pursuant to notice and stipulation, before Peggy S.  
8 Christensen, a Registered Professional Reporter and  
9 Notary Public in and for the State of Wisconsin, at  
10 the offices of DeWitt Ross & Stevens S.C., Attorneys  
11 at Law, Two East Mifflin Street, Suite 600, City of  
12 Madison, County of Dane, and State of Wisconsin, on  
13 the 18th day of April 2012, commencing at 9:04 in the  
14 forenoon.  
15

A P P E A R A N C E S

16  
17 PAMELA R. MCGILLIVRAY and JAMES N. SAUL, Attorneys,  
18 for MCGILLIVRAY, WESTERBERG & BENDER, LLC,  
Attorneys at Law, 211 South Paterson Street,  
19 Suite 320, Madison, Wisconsin 53703, appearing  
on behalf of the Plaintiffs.  
20

21 HARRY E. VAN CAMP, Attorney,  
22 for DEWITT ROSS & STEVENS S.C., Attorneys at Law,  
Two East Mifflin Street, Suite 600, Madison,  
23 Wisconsin 53703-2865, appearing on behalf of  
the Defendant.

24 Also present: Susan George; Jon Hansen, CLVS and  
25 Connie Hansen, CLVS

3

I N D E X

<u>Witness</u>	<u>Pages</u>
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E X H I B I T S

<u>No.</u>	<u>Description</u>	<u>Identified</u>
170	Résumé	8
171	Approved Jurisdictional Determination Form, U.S. Army Corps of Engineers	14
172	Navigable Waters of the U.S. Within the State of Wisconsin	32
173	Packet of photographs labeled "Stream C" photograph locations, 10/18/2011	34

(The original exhibits were attached to the original  
transcript and copies were provided to counsel)

(The original deposition transcript was filed with  
Attorney Harry E. Van Camp)

2

1 VIDEOGRAPHER: Good morning. We  
2 are on the record. This is DVD number 1 of  
3 the evidentiary deposition of Elizabeth A.  
4 Day, case number 11-cv-45 WE -- I'm sorry,  
5 11-cv-45 in the Western District of  
6 Wisconsin, in the matter of Wisconsin  
7 Resources Protection Council, et al., versus  
8 Flambeau Mining Company. This deposition is  
9 taking place in Madison, Wisconsin.

10 Today's date is April 18, 2012. The  
11 time is 9:04 a.m. Today the reporter is  
12 Peggy Christensen. My name is Jon Hansen.  
13 We're both associated with For the Record,  
14 Madison, Wisconsin.

15 At this time counsel will now introduce  
16 themselves and who they represent. After  
17 that the court reporter will swear in the  
18 witness.

19 MS. MC GILLIVRAY: Thank you.  
20 Pamela McGillivray and James Saul from  
21 McGillivray, Westerberg & Bender for the  
22 plaintiffs.

23 MR. VAN CAMP: Good morning. Harry  
24 Van Camp. I represent Flambeau Mining  
25 Company. I'm with DeWitt Ross and Stevens in

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1 Madison, and I'm assisted today by Susan  
2 George.  
3 COURT REPORTER: If you would raise  
4 your right hand, please, ma'am.  
5 THE WITNESS: Yes.  
6 ELIZABETH A. DAY,  
7 called as a witness, being first duly sworn,  
8 testified on oath as follows:  
9 DIRECT EXAMINATION  
10 By Mr. Van Camp:  
11 Q Good morning.  
12 A Good morning.  
13 Q Please tell us your name.  
14 A My name is Elizabeth A. Day.  
15 Q Do you prefer Ms.? Mrs.?  
16 A Ms.  
17 Q Ms., okay. Ms. Day, let me describe what we're  
18 going to be doing here today. I know that you sat  
19 previously for a traditional discovery deposition  
20 taken by the plaintiffs' attorneys last week, I  
21 think.  
22 A Yes.  
23 Q So this is the second deposition that you're  
24 sitting for in this case, and today's deposition  
25 is what we call an evidentiary deposition. It's

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1 taken by the parties that hired you as an expert  
2 witness to be used at trial.  
3 And so we'll be asking you questions relative  
4 to work that you've done in this case, much like  
5 what was done before at the prior deposition taken  
6 by the plaintiffs, but we will be offering this  
7 deposition transcript, which is being recorded by  
8 a court reporter who will prepare a paper  
9 transcript, as well as by a videographer who will  
10 prepare a video recording of this to use in trial.  
11 Why don't you tell us where you live.  
12 A I live in Middleton, Wisconsin.  
13 Q You're familiar, are you not, with the case  
14 Wisconsin Resources Protection Council, Center for  
15 Biological Diversity, and Laura Gauger versus  
16 Flambeau Mining Company?  
17 A Yes, I am.  
18 Q And you were hired in that case; correct?  
19 A Yes.  
20 Q And by whom were you hired?  
21 A By Flambeau Mining Company.  
22 Q And you were hired as an expert witness?  
23 A Yes.  
24 Q What were you hired to do?  
25 A I was hired to go out in the field and look at the

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1 site and determine -- or to get a sense of the  
2 flow of water and whether or not there was a  
3 waterway that existed adjacent to the biofilter.  
4 Q Okay. You prepared a report, did you not?  
5 A Yes.  
6 Q And that report was discussed at the prior  
7 deposition; correct?  
8 A It was.  
9 Q I'm going to hand you a document. Let's write on  
10 that Exhibit 164. Just so that you can refer to  
11 it by exhibit number, you'll recall that in your  
12 evidentiary deposition your report was -- I'm  
13 sorry, your discovery deposition your report was  
14 marked as Exhibit 164?  
15 A Yes.  
16 MR. VAN CAMP: Counsel, would you  
17 like copies of that or do you have --  
18 MS. MC GILLIVRAY: I have it.  
19 Thank you.  
20 MR. VAN CAMP: -- plenty by now?  
21 Okay.  
22 Q Why don't you tell us, if you will, what  
23 qualifications you have, and I think probably to  
24 assist with that, attached as part of Exhibit 164  
25 are a list of qualifications; correct?

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1 A Yes.  
2 Q Could you, please, turn to that.  
3 A Okay.  
4 MR. VAN CAMP: Okay. I'm also  
5 going to mark an additional exhibit, and I  
6 believe the next exhibit number is 170.  
7 Would you agree, Counsel?  
8 MS. MC GILLIVRAY: Yes.  
9 (Exhibit No. 170 marked for  
10 identification)  
11 Q I'm marking your résumé separately as Exhibit 170,  
12 and you're welcome to refer to either one, either  
13 the one that's included in your expert report or  
14 Exhibit 170. But I would like to begin by asking  
15 you to tell me what education you were involved in  
16 after graduating from high school.  
17 A Okay. I went to the University of Wisconsin at  
18 Green Bay and got my bachelor's degree in  
19 environmental science and, let's see, I got that  
20 in 19 -- where is the education -- 1980.  
21 Q And what types of things did you study to receive  
22 that degree?  
23 A It was an interdisciplinary degree. I studied  
24 ecology, I studied earth science, chemistry,  
25 physics, I studied limnology and all kind of

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1 taxonomy classes, botany and little bugs that live  
2 in water, that kind of thing.  
3 Q After you received that degree in 1980, did you  
4 pursue further education?  
5 A Yes. I attended the University of Wisconsin at  
6 Madison and I got my master's in water resource  
7 management, and I got that degree in 1985.  
8 Q Could you tell us briefly what types of courses  
9 you took to obtain that degree.  
10 A My area of concentration was in wetlands and also  
11 in environmental policy, so I had policy courses,  
12 I had hydrology, hydrogeology, I had, oh -- and we  
13 had a master's seminar that was studying  
14 Black Earth Creek and runoff, agricultural runoff  
15 into Black Earth Creek, which is a trout stream.  
16 Q Have you been involved in work related to those  
17 degrees since that time?  
18 A Yes. Ever since that time I've been involved in  
19 environmental science work.  
20 Q Okay. Did you pursue a degree after you received  
21 your master's degree?  
22 A No.  
23 Q Okay. Could you describe your work experience  
24 sort of in chronological sequence, as best you  
25 can, from the time you began working in the

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1 environmental sciences fields.  
2 A Okay. Well, I usually start when I get to  
3 Madison, which is about in 1982. Before that I  
4 was out on the west coast, and I had fisheries  
5 jobs in between the time that I graduated from  
6 Green Bay and the time I went back to school in  
7 Madison. And actually a little bit before I went  
8 back to school in Madison, I started work at the  
9 Department of Natural Resources. I worked down at  
10 Fish Hatchery where I revised the water  
11 resources -- Surface Water Resources of  
12 Dane County. They have a county -- a document for  
13 each county in Wisconsin on surface water  
14 resources.  
15 I then moved up to GEF II where -- at the  
16 headquarters where I was working with the  
17 Wisconsin Wetland Inventory program, and in that  
18 job I interpreted aerial photos to delineate  
19 wetlands on those aerial photos and then made the  
20 orthophoto maps that are still used today in the  
21 Wisconsin Wetland Inventory.  
22 Let's see. After that I worked for the  
23 Wisconsin Department of Transportation as a  
24 biologist, and in that capacity I was pretty much  
25 working on the South Beltline wetland mitigation

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1 design and also during construction of that I was  
2 doing construction monitoring for that work where  
3 they did the wetland mitigation for the South  
4 Beltline through the marsh.  
5 After that I moved out to Massachusetts and  
6 worked as a permit evaluator for the Corps of  
7 Engineers for about a year in Waltham,  
8 Massachusetts. And after that I started my  
9 consulting career. I was in southern  
10 New Hampshire working for Normandeau Associates,  
11 and I worked for them starting in 1987, all the  
12 way through to 1996, and moved up to Maine with  
13 them and started their office in Maine.  
14 Then we moved back out to Wisconsin, and in  
15 1996 I began work at URS Corporation, which had  
16 some other names before that, and again I was an  
17 environmental scientist with URS doing primarily  
18 wetlands delineation work, waterway  
19 characterization, and permitting.  
20 And after that I moved to Natural Resources  
21 Consulting in 2001, and that was -- NRC was  
22 purchased by Stantec Consulting Services in 2010,  
23 mid-year of 2010. So now that firm is Stantec  
24 Consulting Services, and I've been there since  
25 2001.

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1 Q Describe generally for us the types of projects  
2 that you've worked on since 2001 with Stantec.  
3 A Well, that evolved over the years. Initially we  
4 were doing what we term as parcel delineations,  
5 where a developer wants to build something on a  
6 piece of land and they need to know where the  
7 wetlands are on that piece of land. And so we'd  
8 delineate those wetlands, characterize the  
9 waterways and determine -- help them determine  
10 which permits they needed. If they could avoid  
11 those wetlands, that's what we counseled, and we  
12 would write the permit applications. We would  
13 write delineation reports.  
14 As we moved on, we began work for industrial  
15 concerns, utility concerns, did larger projects,  
16 transportation concerns, longer corridor type  
17 projects where we were doing the same type of work  
18 for miles on end and also including rare and  
19 endangered species, habitat characterization and  
20 surveys.  
21 Q I noticed that you have listed in your résumé a  
22 number of projects that you have experience with.  
23 One of them involves Cedar Ridge Wind Farm in  
24 Fond du Lac County. Can you just briefly describe  
25 the type of work that you were involved in in that

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1 project.  
2 A Well, NRC at the time was identifying where the  
3 wetlands occurred on that entire parcel, which was  
4 several square miles, and it was about at that  
5 time that the -- I think it was maybe at the time  
6 where the *Rapanos* ruling came down and the  
7 guidance came out for jurisdictional  
8 determinations, and it was a time when the wind  
9 farms needed to move quickly and get toward the  
10 construction quite quickly, so I was brought in to  
11 the project toward the end to help do  
12 jurisdictional determinations because I had been  
13 with the Corps and I was kind of the policy person  
14 and understood how these things were coming  
15 together.  
16 So I prepared a number of preliminary  
17 jurisdictional determinations. That is quite  
18 different than the preliminary JDs that are done  
19 by the Corps now. Those didn't exist at the time.  
20 The reason I said preliminary is because I'm not  
21 the agency and they have to make the final  
22 determination. But it was using the seven-page  
23 form that was new at that time. Excuse me.  
24 Q What form is that that you just referred to?  
25 A That form is in my expert report, Exhibit 164.

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1 Q Before you go on, I'm going to mark that form as  
2 Exhibit 171. Once again, you're welcome to refer  
3 to the one that's actually attached to your report  
4 or the one that we've just marked as Exhibit 171.  
5 A Okay.  
6 (Exhibit No. 171 marked for  
7 identification)  
8 Q And you said that before that form was developed.  
9 Just tell us briefly at this point what  
10 Exhibit 171 is.  
11 A Exhibit 171 is an Approved Jurisdictional  
12 Determination form. I'm just looking to see if it  
13 has a date on it of when it was developed, but I  
14 don't see that. It's a U.S. Army Corps of  
15 Engineers form, and it is to be completed by  
16 instructions that were in an entirely separate  
17 instructional guidebook.  
18 Q Are you familiar with that guidebook as well?  
19 A Yes.  
20 Q Is that form and that guidebook things that you  
21 use in your profession?  
22 A I used them at one point in time, but since that  
23 time the Corps of Engineers has developed these  
24 preliminary jurisdictional determinations where  
25 they essentially assume that an area is a

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1 jurisdictional wetland so that processing of  
2 permits can move forward.  
3 Q Okay. Could you briefly go through the other  
4 projects that you have specifically identified in  
5 your résumé and indicate roughly when you worked  
6 on those projects and the types of work that you  
7 performed, beginning with the Upper Sugar River/  
8 Badger Mill Creek watershed.  
9 A That was for the City of Verona, and they were  
10 looking to expand their urban service area, and so  
11 I worked with another firm who was doing  
12 hydrologic studies and I inventoried the sensitive  
13 resources in the watershed and helped the city  
14 develop -- or developed for the city  
15 recommendations for protecting the cold water  
16 fishery resource, which is the Sugar River and  
17 Badger Mill Creek.  
18 Q And approximately when did you work on that  
19 project?  
20 A That was probably about five years ago, four years  
21 maybe.  
22 Q Okay. And the next project you refer to is the  
23 Harley Davidson Motor Company project. What is  
24 that?  
25 A That is a project I worked on when I was at URS,

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1 and over in Wauwatosa they needed to expand their  
2 testing area for the Harley engines and it  
3 required a very particular configuration of  
4 building, which meant they needed to affect a  
5 stream, a very small stream and a small wetland  
6 area, and I helped delineate, characterize those  
7 resources, do the impact assessment, put the  
8 permit application together, and worked through  
9 that permitting process with the DNR.  
10 Q Okay. And the next project that you referred to  
11 is the Middleton Hills project. Could you tell us  
12 what that involved?  
13 A Middleton Hills is a -- I forget exactly what they  
14 call it, but it's one of these modern developments  
15 where it sort of goes -- it's kind of a  
16 retro-modern development where they go back and  
17 have very small yards and narrow alleyways behind  
18 the homes, and they were wanting to do something a  
19 little different with their storm water. There  
20 was a wetland down the middle of the development.  
21 DNR required that the storm water not go directly  
22 into that area, so we developed some storm water  
23 management four bays that were quite unusual and  
24 did a wetland restoration in that area that had  
25 been receiving sediment from former agricultural

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1 land uses for many years, and that is the focus,  
2 central focus of the development now and has  
3 walkways around it, and it's a pretty nice area.  
4 Q Approximately when did you work on that project?  
5 A That was also when I was at URS, so it had to have  
6 been prior to 2001.  
7 Q Okay. The next project you referred to is the  
8 Perrier Group. Could you tell us what was  
9 involved in that project?  
10 A In that project we inventoried and characterized  
11 the wetlands and threatened endangered species at  
12 the proposed Adams -- at the one-time proposed  
13 Adams County well for, oh, not Poland Springs but  
14 the -- oh, Perrier that was trying to do a high-  
15 capacity groundwater extraction well.  
16 Q And approximately when did you work on that?  
17 A That was also at URS.  
18 Q Okay.  
19 A A couple of these projects went from when I was at  
20 URS and I brought them over to NRC as well.  
21 Q Okay. Then just if you can quickly go through the  
22 remainder of those projects. There is a Chevron  
23 project, an Amoco project -- or two Amoco projects  
24 and an Exxon project.  
25 A The Chevron project was back when I was in Maine,

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1 and that was quite a large area. It was for a  
2 proposed mining project on Bald Mountain, that I  
3 don't know if it ever occurred, but we did quite a  
4 bit of plant surveys and wetland and waterway  
5 surveys and characterization and put together  
6 reports of our findings.  
7 The Amoco projects in Illinois were wetland  
8 delineation projects essentially where we did  
9 permitting as well with the Corps of Engineers.  
10 And the Exxon project down there was also  
11 quite similar, and we got jurisdictional  
12 concurrence from the Corps of Engineers.  
13 Q You've used the term several times in your answers  
14 so far jurisdictional determinations.  
15 A Yes.  
16 Q Can you just describe what you mean by  
17 jurisdictional determinations?  
18 A Well, as environmental scientists and wetland  
19 biologists, we delineate the wetlands and  
20 characterize the waterways based on guidance and  
21 standard methodologies that the agencies develop,  
22 but we're very careful to point out that it is the  
23 agencies that make that final determination of  
24 their own jurisdiction. So we've simply provided  
25 the information to the agencies to review so that

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1 they can make their own determination.  
2 Q Okay. The next caption in your résumé refers to  
3 water resource restoration. Could you just tell  
4 us briefly for each of those referenced projects  
5 what they involved?  
6 A Well, for the North Fork Pheasant Branch Creek  
7 Restoration in Middleton, that was a ditched  
8 portion of the upper part of Pheasant Branch Creek  
9 that was over by the Morey Airport, and we were  
10 expanding the floodplain essentially by digging  
11 out a lot of material and then within that  
12 floodplain did a design for a remeandered stream,  
13 a more naturalistic looking stream, and wetland  
14 restoration in that area. It was quite a large  
15 development. Do you want me to go to the next  
16 one?  
17 Q Sure, if you don't mind.  
18 A At the Wade House state historic site in  
19 Greenbush, that was a project where they wanted to  
20 restore a working sawmill, and the dam for that  
21 mill pond for the sawmill had self-destructed over  
22 the years and they wanted to rebuild it but the  
23 DNR really no longer is interested in having  
24 anybody create new dams, so we worked on a very  
25 unusual design that made it look like there was a

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1 mill pond but it maintained the free flowing  
2 stream around it but still -- we were still able  
3 to have the sawmill work. So that was quite a  
4 long study of looking at the wetlands.  
5 There were also endangered mussels in the  
6 stream, and we did a relocation -- or managed that  
7 part. That was a subcontractor that did it. That  
8 was a very long process that required quite a bit  
9 of coordination with the DNR.  
10 The Discovery Springs project was also over  
11 in Middleton. That's a development at the  
12 northwest corner of 12 and 14, and that was former  
13 wetland over there that essentially has been  
14 drained over the years through drainage ditches,  
15 and we did the wetland delineation and a stream  
16 relocation project there and also the enhancement,  
17 similar to the North Fork project, where we  
18 remeandered a section of the formerly channelized  
19 stream.  
20 Q Then there is a reference to a South Beltline  
21 project?  
22 A Yes. That's the project I was talking about that  
23 I did when I worked for the Department of  
24 Transportation developing designs for the  
25 restoration and enhancement of 25 acres of

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1 wetlands in -- as mitigation for the approximately  
2 18 acres that were filled for the South Beltline.  
3 Q Okay. And then finally there is a reference to  
4 another project involving Kohler Company?  
5 A Yes. That was over in Sheboygan where they were  
6 developing their Whistling Straits Golf Course and  
7 they had some wetlands that they had filled in the  
8 process and we developed a wetland mitigation plan  
9 to actually create and restore a total of 20 acres  
10 of wetlands there.  
11 Q Thank you. I'd like to ask you about a term that  
12 you've used repeatedly in your answers so far,  
13 wetland delineation. Could you tell us what doing  
14 a wetland delineation is?  
15 A Certainly. There is a Corps of Engineers  
16 methodology that calls for identifying field  
17 criteria of the three components that define  
18 wetlands. There is a wetland definition from the  
19 Clean Water Act that I used to be able to state by  
20 memory, but it has components addressing  
21 hydrology, soils, and vegetation. And a wetland  
22 delineation is when you go out and you observe  
23 the -- generally first the lay of the land and the  
24 various plant communities that are supported by  
25 that landscape, and when you see a change in that

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1 community from primarily wetland to primarily  
2 upland vegetation, you need to determine the exact  
3 point where that -- the exact line along which  
4 that change occurs, and so you look at soils on  
5 one side and soils on the other side and you  
6 characterize those and you look for hydric or  
7 nonhydric -- versus nonhydric components. The  
8 same thing with evidence of hydrology.  
9 At any given time when you're out there doing  
10 the wetland delineation, you don't necessarily  
11 have the hydrologic criteria right there in front  
12 of you, but there are indicators for that  
13 hydrology. The same thing with the soils.  
14 And then there is a list of vegetation that  
15 you refer to, and each species has a ranking of --  
16 on a range between upland and wetland and you take  
17 the dominant vegetation, and it's quite  
18 complicated. I'm simplifying it quite a bit. But  
19 essentially you put the line in between two points  
20 in which you find upland -- or I should say  
21 nonwetland characteristics and the point at which  
22 you find wetland characteristics.  
23 Q Over the years approximately how many wetland  
24 delineations have you been involved in?  
25 A Well, you know, some of the wetlands are very,

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1 very large. Some are quite small. The Corps of  
2 Engineers has always said that they don't really  
3 care how small the wetland is, they still regulate  
4 it. So that then puts me in the hundreds of  
5 wetlands that I've delineated over my career  
6 because I've done, like I said, many corridor-type  
7 projects where you've got a straight line  
8 essentially running across the landscape, along  
9 which you could encounter a large number of  
10 wetlands, large and small.  
11 Q In addition to your education, do you hold any  
12 certificates or registrations in your field?  
13 A I am licensed as a Professional Hydrologist with  
14 the State of Wisconsin Department of Regulation  
15 and Licensing. I also am certified as a  
16 Professional Wetland Scientist with a professional  
17 organization called the Society of Wetland  
18 Scientists, and that's kind of a juried  
19 certification that has to be maintained through  
20 education and practice and has to be renewed every  
21 five years.  
22 Q Approximately how long have you held the  
23 Professional Hydrologist designation registered  
24 with the Wisconsin Department of Regulation and  
25 Licensing?

23

1 A Gee, I wish I had the dates down here but I don't.  
2 I did that right after they first came up with the  
3 designation itself, and I believe that was passed  
4 while I was at URS, so it was sometime between '97  
5 and 2001. The Society -- or the Professional  
6 Wetland Scientist one I did while I was at  
7 Normandeau Associates, and so that was about in --  
8 I believe I did it in '87.  
9 Q Have you maintained those registrations or  
10 designations since the time you first obtained  
11 them?  
12 A Yes, I have.  
13 Q And have you qualified by taking the courses that  
14 you're required to do so to maintain them in good  
15 standing?  
16 A Yes.  
17 Q Do you belong to any associations associated with  
18 your profession?  
19 A Yes. I am a member of the Society of Wetland  
20 Scientists, the Association of State Wetland  
21 Managers, the Wisconsin Wetland Association.  
22 Those are the major professional ones.  
23 Q Approximately how long have you been associated  
24 with those professional organizations?  
25 A I have been involved in the Society of Wetland

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1 Scientists since I was in grad school in the  
2 mid-Eighties, and with the Association of State  
3 Wetland Managers, probably soon after that. I  
4 believe I got involved in that when I was working  
5 at the DNR later on in that career, about  
6 maybe '84. So quite a long time for both of them.  
7 And the Wisconsin Wetland Association, I  
8 think I might have dropped my membership when I  
9 was out in Maine, but I've been a member since I  
10 was in grad school in the early Eighties  
11 otherwise.  
12 Q Okay. Now I notice under the caption of  
13 publications authored you indicate that the nature  
14 of your work is to do publications or writings for  
15 clients; correct?  
16 A That's correct.  
17 Q In the last ten years approximately how many  
18 reports or writings do you think you have been  
19 involved in preparing for clients that involve  
20 wetlands or wetland delineations?  
21 A Oh, I would say on the average ten per year. More  
22 early on than more recently.  
23 Q And you also mentioned during a response to some  
24 of the questions that you were involved in various  
25 permit applications. Would you tell us a little  
25

1 more about what's involved in work you do related  
2 to permit applications?  
3 A Once the information is gathered in the field on  
4 wetlands and waterways and work has been done with  
5 the client to minimize those impacts, then for the  
6 unavoidable impacts we will put together a permit  
7 application, which essentially describes the  
8 project they're trying to do, describes the  
9 natural resources that are being affected and  
10 lists the alternatives that were explored in  
11 arriving at the final proposal, and those are the  
12 essential components of a permit application.  
13 Q Give us examples of the agencies that would issue  
14 permits that you've been involved in applying for.  
15 A In Wisconsin, the Department of Natural Resources,  
16 the Corps of Engineers. There are also some with  
17 the U.S. Fish and Wildlife if we're affecting  
18 federally listed species, then sometimes with  
19 municipalities or county organizations depending  
20 on which ordinances are in effect in those areas.  
21 Q Have you ever provided any form of expert  
22 testimony before in any sort of agency hearings or  
23 courts?  
24 A Yes.  
25 Q Could you describe the types of matters that you  
26

1 have testified about in the past.  
2 A I have -- Back in Maine I think was the first time  
3 I did that. It was an administrative hearing with  
4 regard to siting a special waste landfill which  
5 involved some wetland impacts, and I testified to  
6 my -- what I had seen out there as far as wetlands  
7 and waterways.  
8 And then I think -- oh, there was probably --  
9 I think there was another special waste landfill  
10 out there that I also did the same kind of thing  
11 for.  
12 And then when I came to Wisconsin I -- let's  
13 see. I've done one small administrative hearing  
14 with regard to a wetland up in the northeast part  
15 of the state, the Green Bay area, where we found  
16 wetlands that the DNR had not found, and so that's  
17 what the hearing was about there.  
18 And then more recently I have done a couple  
19 of hearings. I did one for the Arrowhead to  
20 Weston transmission line where I was the expert  
21 witness having to do with wetlands and waterways,  
22 and the same thing with Rockdale to West Middleton  
23 transmission line, and that was just a few years  
24 back, 2009, I guess, again testifying as to the  
25 extent and character of wetlands and waterways.  
27

1 Q Okay. Thank you very much. Looking briefly, if  
2 you would, at Exhibit 170, which is the separate  
3 document that contains your detailed  
4 qualifications, I notice that behind your name  
5 there are initials, PWS and then there are  
6 initials PH. Do you see those?  
7 A Yes.  
8 Q Could you tell us what the designation first of  
9 PWS is and then what the designation PH is?  
10 A PWS is Professional Wetland Scientist and PH is  
11 Professional Hydrologist.  
12 Q And are those the designations that you talked  
13 about earlier involving registrations or  
14 certificates?  
15 A Yes, they are.  
16 Q Okay. Now I would like to move back to  
17 Exhibit 174 which is your --  
18 A 64?  
19 Q I'm sorry, 164. Pardon me. 164, that is your  
20 expert report. The first caption is an  
21 introduction, and could you tell us what you have  
22 presented in the section entitled introduction?  
23 A That simply talks about what I was retained to  
24 look at, which was to review existing documents  
25 about the Flambeau Mine project and to make  
28

1 on-site observations about the water resources  
2 within and adjacent to the biofilter.  
3 Q How many times did you visit the Flambeau Mine  
4 site?  
5 A I visited just once.  
6 Q And what was the date of that visit, if you  
7 recall?  
8 A The date was in October of 2011, and it was the  
9 18th of October 2011.  
10 Q The next section after the introduction is the  
11 summary of conclusions. Can you tell us what  
12 you've included in the summary of conclusions  
13 within your report?  
14 A My conclusions were with regard to the  
15 jurisdictional status of the Flambeau River and  
16 the drainageway that's been known as Stream C, and  
17 what I concluded was that -- and these, of course,  
18 are preliminary determinations that are based on  
19 the available guidance from the agencies, but  
20 Flambeau River I felt met the definition of a  
21 federal traditional navigable waterway and that  
22 Stream C -- the drainageway that has been called  
23 Stream C over time did not meet that definition in  
24 my opinion and that Stream C, there was no defined  
25 waterway that existed adjacent to the biofilter

29

1 and that that started -- where I observed that was  
2 south of Copper Park Lane essentially offsite of  
3 the industrial outlot.  
4 And I also looked at the biofilter itself and  
5 very closely at the discharge area and determined  
6 that, although it might discharge intermittently,  
7 it didn't appear to discharge directly to the  
8 lowest part of the drainageway and the wetland  
9 adjacent to it and I didn't see a stream there  
10 anyway.  
11 And I also found that you'd need to determine  
12 whether that wetland adjacent to the biofilter was  
13 a water of the U.S. or not, and that would require  
14 a significant nexus analysis.  
15 Q To the extent that you presented those summary of  
16 conclusions, can you tell us whether or not those  
17 are based upon your experience and your education  
18 in your field and whether or not they are opinions  
19 that you hold to a reasonable degree of certainty  
20 within your field?  
21 A They're -- yes. They're based on the breadth of  
22 my knowledge gained over my career. They're based  
23 on review of -- or use over time of the documents  
24 that -- the guidance documents that the agencies  
25 put out, and they're based on my observations and

30

1 also my review of materials that others had put  
2 together that are listed later on in my report.  
3 Because I only went there one time, I needed to  
4 rely on reports of others in order to gather  
5 information, because whenever you're looking at  
6 hydrology, it's never a one-time thing. You have  
7 to look at changes over time.  
8 Q Okay. And are the documents that you referred to,  
9 and we'll look at those in a minute more  
10 carefully, but are those the types of documents  
11 that a person in your profession would rely on for  
12 determinations of this sort included in your  
13 report?  
14 A Yes.  
15 MS. MC GILLIVRAY: Objection, form.  
16 It's vague as to what documents.  
17 Q Okay. You can go ahead and answer.  
18 A Well, referring to the list of documents that are  
19 reviewed on page 4 of Exhibit 164, yes, those are  
20 the types of documents that, you know, one would  
21 typically look at in order to do our work. I mean  
22 essentially as a scientist we -- as scientists we  
23 always try to gather as much information as we can  
24 about an area to give a perspective of its place  
25 in the landscape.

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1 Q And would that answer also apply to the two  
2 documents referred to at the top of page 5 of your  
3 report?  
4 A Oh, yes.  
5 Q Okay.  
6 A That's included.  
7 (Exhibit No. 172 marked for  
8 identification)  
9 Q You used a term in your answer a traditional  
10 navigable waterway, and I would like to show you a  
11 document that has now been marked as Exhibit 172.  
12 Once again, Exhibit 172 is a document which  
13 also appears in your report, and it's just been  
14 marked separately. Could you tell us what  
15 Exhibit 172 is, please?  
16 A Sure. Exhibit 172 is a list of navigable waters  
17 of the U.S. within the state of Wisconsin that is  
18 published by the U.S. Army Corps of Engineers on  
19 their website, and I refer to it frequently in my  
20 work when I'm trying to determine whether a given  
21 waterway is regulated under Section 10 of the  
22 Rivers and Harbors Act. This is slightly  
23 different than the term traditional navigable  
24 waters, which is expanded by the guidance -- its  
25 meaning is expanded by the guidance. These are

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1 navigable waters that a commercial vessel can  
2 operate on and it lists the head of navigability  
3 for each of those waters, but there are other  
4 waters that are included as traditionally  
5 navigable by the Corps since the Rapanos decision.  
6 Q Looking at Exhibit 172, what is the closest  
7 navigable water to the biofilter at the  
8 Flambeau Mine site?  
9 A Probably the Wisconsin River. Is that on here?  
10 Yes.  
11 Q The Chippewa River is also on there; correct?  
12 A Oh, okay, the Chippewa. Yeah, it runs into the  
13 Chippewa.  
14 Q Okay. But the Flambeau River is not on there;  
15 correct?  
16 MS. MC GILLIVRAY: Objection,  
17 leading.  
18 Q Okay. Could you tell us whether or not the  
19 Flambeau River appears on Exhibit 172?  
20 A It does not appear on Exhibit 172.  
21 Q You have concluded in your report that some of the  
22 bodies of water referenced constitute traditional  
23 navigable waters and some do not. Do you see that  
24 in your report?  
25 A I've put that in the summary of my conclusions

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1 which I just talked about earlier, but also I  
2 expand on it in my observations and finding of  
3 fact and in my jurisdictional descriptions, and I  
4 hit on that several times.  
5 Q Okay. Well, why don't we take a look, then, at  
6 your observations and findings, and why don't you  
7 tell us what you did in connection with the work  
8 you did on this project.  
9 A On the 18th of October we walked the drainageway  
10 that runs past the biofilter starting slightly  
11 east of Highway 27 and going all the way down to  
12 the Flambeau River, essentially trying to locate a  
13 waterway within the area that's been labeled on  
14 various maps and figures put together over time by  
15 the Flambeau Mining Company and their various  
16 consultants that are labeled as Stream C.  
17 Q Okay. I'd like to digress for just a moment and  
18 have you take a look at a document that is being  
19 marked as Exhibit 173.  
20 (Exhibit No. 173 marked for  
21 identification)  
22 Q Exhibit 173 is also a document that is included in  
23 your report, but unfortunately I think the report  
24 I gave you may have black-and-white pictures in  
25 it. These are color pictures of the photographs

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1 in your report. Do you want to take just a moment  
2 to describe what Exhibit 173 is?  
3 A Yes. On the day I was out there, on October 18th,  
4 I took a number of photographs so I could  
5 supplement my report and also to help me remember  
6 what I was seeing where. And so those pictures  
7 begin on the third page of Exhibit 173 and are  
8 captioned.  
9 And then the first two pages of the exhibit  
10 are essentially location maps. The one at the top  
11 is an index of the next four images, showing where  
12 they are on the landscape, aerial A being --  
13 covering the uppermost portion of the drainageway  
14 that I said -- that I described walking, and  
15 aerial B being the part -- the first part south of  
16 Copper Park Lane, aerial C and D showing the  
17 remainder of it.  
18 And I actually traced -- since there weren't  
19 any maps that showed the drainageway of Stream C,  
20 since it's an unnamed stream and it's so  
21 intermittent, having walked in that area I was  
22 able to take a close-up look at this aerial, and  
23 in aerial B, C and D I've actually put in a dashed  
24 blue line that's kind of hard to see but it shows  
25 the alignment of the waterway.

35

1 Q Looking at the lower aerial photo titled aerial  
2 photo A on Exhibit 173.  
3 A Yes.  
4 Q There are numbers in white boxes. What do those  
5 numbers refer to?  
6 A Those are the numbers of the photographs that  
7 begin on page -- on the third page of Exhibit 173.  
8 Q And do the photographs then correspond to the  
9 locations of those?  
10 A Yes.  
11 Q And would that also be true for aerial photo B?  
12 A That's correct.  
13 Q And aerial photo D?  
14 A Yes.  
15 Q And then to the extent that aerial photo B and C  
16 have a line, a blue line, who was responsible for  
17 putting that, if you know?  
18 A I put that on the map.  
19 Q Okay. And did you do that after your visit to the  
20 site?  
21 A Yes, I did.  
22 Q Okay. Then as we go through the rest of your  
23 report, if you feel that one of the photographs or  
24 portions of Exhibit 173 show an area that you're  
25 discussing, feel free to refer to that. Okay?

36

1 A Okay.  
2 Q Okay. Then if you would, please, describe your  
3 observations on your visit regarding culverts on  
4 the site.  
5 A Oh, okay. Let's see. There is a culvert --  
6 Culverts essentially convey drainage across a  
7 landscape that is bisected by obstructions, the  
8 first one of which we reviewed was Highway 27.  
9 That has a culvert going under it. And then there  
10 is a culvert going under what is the extension to  
11 the west of Jansen Road, as can be seen on the  
12 overview, the first image at the top of  
13 Exhibit 173. I think there were two culverts  
14 under that, and they were trending  
15 northeast-southwest. Oops. No, I'm getting ahead  
16 of myself here.  
17 Jansen Road -- the extension of Jansen Road  
18 to the west is Copper Park Lane, so that would be  
19 the third -- the fourth culvert moving down the  
20 stream, so I need to look at something different.  
21 Okay. Those two culverts trending  
22 northeast-southwest can be seen on aerial A just  
23 to the west of photo number 5, and that's an old  
24 railroad grade.  
25 Moving downgradient, there is another culvert  
37

1 that's shown on aerial A as a purple line under  
2 the access road just adjacent to the photo 13  
3 marking. Then the last culvert is under Copper  
4 Park Lane.  
5 Q Now I'd like to ask you to describe a culvert for  
6 us and how culverts are installed with reference  
7 to the grade of the property around them.  
8 A Well, as I said earlier, culverts are -- they're  
9 usually designed by an engineer so that they --  
10 and the engineer tends to look at -- will  
11 definitely look at the entire watershed. They'll  
12 look at the size of the watershed and they'll look  
13 at rainfall and they'll look at the vegetation  
14 within the watershed so that they can tell how  
15 quickly the water within all points of that  
16 watershed is likely to concentrate enough so that  
17 it would want to get through that culvert, and  
18 then they size that culvert so that that culvert  
19 will not back up water or create flooding  
20 upstream, and they typically place that culvert so  
21 that it goes below the water table and -- so that  
22 the water can easily get through.  
23 Q When you say they install it so that it's below  
24 the water table, what do you mean by that?  
25 MS. MC GILLIVRAY: I'm going to  
38

1 object based on this opinion is outside the  
2 scope of her expert report.  
3 Q Okay. What do you mean by that?  
4 A Well, let's see. We can show a photo I think,  
5 can't we? I don't have any good ones that really  
6 show it, but I guess the best one would be 13.  
7 And what I'm talking about there is that,  
8 you know, they don't place the bottom of the  
9 culvert right on top of the surface of the  
10 wetland. They put it below because this is a type  
11 of wetland that is seasonally saturated and they  
12 want the water to flow through more easily so they  
13 put it a little bit lower where the water  
14 typically is, because the water is often below the  
15 surface of these types of wetlands, the water  
16 table itself, so they just put it down a little  
17 bit lower.  
18 Q Okay. Then if you could describe, as you have on  
19 page 3 of your report, the observations that you  
20 made when you visited the Flambeau Mine site.  
21 A Right. I think sometimes people can mistake the  
22 channels that -- the channel segments that tend to  
23 appear immediately upstream and downstream of  
24 culverts as channels when they're kind of -- well,  
25 let's see, where do I start talking about it? On  
39

1 page 3 near the top, I was talking about observing  
2 those culverts that I just described, and since I  
3 was out there looking for channels, I was  
4 naturally keyed into anything that looked somewhat  
5 like a channel. So at the culverts I noted short  
6 segments of channel-like features, and they were  
7 just upstream -- upgradient and downgradient of  
8 each culvert and they were really standing water  
9 kind of ranging in length from less than a foot to  
10 maybe 6 or so feet beyond the ends, either end of  
11 the culvert. And I've seen those in my career  
12 lots of times, and it has to do with the way these  
13 culverts are placed; that essentially they  
14 concentrate the water in one place so it scours  
15 out a little bit as it's entering and exiting, but  
16 that is -- it's not a continuous channel.  
17 Q And when you observed that standing water, where  
18 is that standing water in relationship to the  
19 surface of the surrounding land?  
20 A It's wherever the water table is at that  
21 particular point in time, and when I was out there  
22 was during a period where the wetland was not  
23 quite saturated to the surface so it was slightly  
24 below -- the water level was slightly below the  
25 surface of the -- the ground surface of the  
40

1 wetland adjacent to the biofilter.  
2 Q Okay. And would you describe the way you walked  
3 the area between the railroad spur that you  
4 identified on Exhibit 173 and Copper Park Lane.  
5 Just describe how you walked.  
6 A Well, in the work that I do, I'm often -- I'm very  
7 often, even when I'm just delineating wetland,  
8 I'll be looking for surface water connections and  
9 other hydrologic connections between water  
10 resources on a given site, and in this one, since  
11 my main purpose was to see whether or not there  
12 was a channel, a defined channel anywhere along  
13 this drainageway that's been called Stream C over  
14 time, I pretty much was starting at a culvert,  
15 kind of zigzagging along trying to find the lowest  
16 spot I could, looking between -- you know,  
17 spreading apart the vegetation, looking for even  
18 the smallest continuous channel that I could find,  
19 and I did that through each segment between the  
20 railroad grade and Highway 27. I looked a little  
21 bit north of 27, but I really didn't go very far  
22 upgradient there, probably about 20 feet or so,  
23 but I didn't find any channel there beyond what I  
24 just had described about the scoured area adjacent  
25 to the culvert. In fact, on that culvert, the

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1 upstream end -- upgradient end of the culvert  
2 under 27, there wasn't even any of that scouring.  
3 There was a small area on the downgradient side.  
4 As more flow -- As you go downgradient, you  
5 have a larger contributing drainage area and so  
6 you have more water, whether it's surface water or  
7 sheetflow or interflow or groundwater flow, and so  
8 you have more scouring as you go downgradient.  
9 But in any case, from the railroad grade down  
10 to Copper Park Lane I continued that zigzag  
11 pattern of trying -- of multiple crossings over  
12 the lowest point in that wetland to try to find  
13 any kind of defined channel and finally found that  
14 south of Copper Park Lane.  
15 Q Above that area you just described as south of  
16 Copper Park Lane, can you tell us whether or not  
17 you were able to locate a perceptible stream  
18 channel?  
19 A Let's see. I think I have a description of that.  
20 Oh, it's probably in my observations section. Oh,  
21 and it's also in the -- I think the photos are  
22 illustrative.  
23 The drainageway south of Copper Park Lane is  
24 shown in photo 14, and over on the right, you know  
25 the photo is not that great, but over on the right

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1 you see kind of an archway, and that is rip-rap  
2 that's been placed I think, because that's --  
3 where the person is standing is where the culvert  
4 comes under the road and then there is a sharp  
5 turn to the west, and I think in order to prevent  
6 erosion at some point somebody placed that rip-rap  
7 there. But, as you can see, there is really not  
8 even much of a channel there. There is grass  
9 growing all the way through it, but that's where  
10 the drainage kind of filters through.  
11 And if you look at photo 15 on the next page,  
12 I essentially turned around and looked  
13 downgradient. Now a lot of leaves had fallen so  
14 it's hard to see in this photo, but in the upper  
15 left of photo 15 you can kind of see a meandering  
16 channel and banks, and those banks are about, oh,  
17 2 to 3 feet wide at that point. So kind of right  
18 where I'm standing taking downgradient photo 15  
19 and upgradient taking photo 14 is where I really  
20 saw the channel begin.  
21 Q Okay. Let's go back up to the area between  
22 Copper Park Lane and the railroad spur.  
23 A Okay.  
24 Q Can you describe the photographs that you have  
25 from that area and what you found and observed in

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1 that area.  
2 A Okay. So there is the -- the area labeled on  
3 Exhibit 173 as the RR grade, or railroad grade on  
4 the bottom of the two images, the one labeled  
5 aerial A, I'll work downstream from there. All  
6 the photos upgradient from there are just kind of  
7 a bunch of grass, 1 through 5. It's hard to see  
8 anything through the grass.  
9 Then photos 6 through 11, it's kind of the  
10 same thing. 6 through 11 is where I was trying to  
11 look at the overflow from the biofilter. So photo  
12 6, you can see a little bit of water in the upper  
13 left, and what I'm doing there is looking --  
14 trying to view through the grass but not being  
15 very successful at it. What was under there was  
16 the rocky kind of overflow lip, or berm, or the  
17 portion of the eastern berm of the biofilter that  
18 was slightly lower and was fitted with rip-rap to  
19 keep it from eroding if there were to be an  
20 overflow. So it was designed that way. I mean  
21 that's what engineers do. They have to have an  
22 outlet, and they have to protect that outlet in  
23 case it is -- in case they get more flow than they  
24 had maybe predicted.  
25 Photo number 7 -- oh, I wanted to point out

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1 something else in photo 6. In the lower part of  
2 the photo there is a flag, and that's essentially  
3 one of the flags I think Jim Engelhardt placed  
4 from Stantec when he was doing the wetland  
5 delineation, or somebody placed it. That's  
6 essentially the edge of the -- the southern edge  
7 of the lip, the overflow -- the southern edge of  
8 the overflow lip on the berm itself.

9 And then number 7, you know again I was  
10 trying to find all of the places where I could see  
11 concentrated flow. So this was probably slightly  
12 over to the right of photo 6. I took photo 7  
13 where I could see some concentration of water, and  
14 this was on the level portion of the lip of the  
15 overflow structure, and what you see there is a  
16 tape measurer where we're just kind of measuring  
17 the various features we saw.

18 Figure 8 -- I'm sorry, photo 8 moves slightly  
19 down over the edge of the biofilter berm, and I  
20 had seen somewhat of an eroded wash there so I was  
21 trying to take a photo of it. It's really hard to  
22 take it through the dense grass.

23 Photo 9 is a similar kind of thing. It's  
24 about halfway down the berm slope, and I think  
25 what I was doing there, the waterway -- or the

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1 eroded wash that you can see runs across the top  
2 third of the photo from left to right.

3 And then photo 10 shows right before the  
4 wetland levels out, or right above the base of the  
5 biofilter berm. Again this eroded wash that I  
6 could see runs from left to right, this time  
7 across about the middle of the photo.

8 And then finally photo 11 gets down to the  
9 base and shows what the wetland looks like  
10 directly adjacent to the east of the biofilter at  
11 the base of the berm.

12 So, as you can see, I looked at it in a lot  
13 of detail. I was trying to find this drainage but  
14 not showing it very well in these photos. Sorry  
15 about that.

16 Q Do the photos depict what you were able -- I mean  
17 they depict what you were able to see?

18 A I mean I was able to see a little bit more when I  
19 got down and moved the vegetation aside and looked  
20 for a drainageway but then the vegetation would  
21 always squeeze back together when I got up to take  
22 the photo.

23 Q Okay. So based on these observations, what did  
24 you conclude?

25 A I concluded that there was no continuous channel

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1 running down the face of the biofilter berm. And  
2 I also, as I moved from photo 11, photo 12, I did  
3 that same zigzag to try to find -- this was a  
4 wider area -- trying to find any direct channel  
5 running from the base of the biofilter to the  
6 lowest part of the wetland east of the biofilter,  
7 but I wasn't able to find anything. So anyway, I  
8 concluded that there was no defined channel  
9 running down the face -- the east face of the  
10 biofilter berm, nor was there a defined channel  
11 extending through the wetland towards the lowest  
12 point of that wetland.

13 Q Now in addition to visiting the property, you also  
14 reviewed some documents relative to what you have  
15 termed throughout your report as "Stream C," and  
16 first of all, could you tell us why you refer to  
17 it as "Stream C"?

18 A Well, naturally when I was told that I was -- that  
19 Stream C, and certainly when I read the complaint  
20 and saw that Stream C was in question, I wanted to  
21 learn whatever I could about it, and so I reviewed  
22 various documents that had been put together by  
23 Foth over the years and some of these other  
24 documents I mentioned in here that actually used  
25 figures from the Foth reports in their documents

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1 in order to depict where "Stream C" is, and what I  
2 gathered was that -- well, when I was talking  
3 earlier about how engineers design culverts and,  
4 you know, it's their job to maintain -- or to  
5 convey water across barriers and to make sure it  
6 doesn't get detained anywhere that it's not  
7 intended to be detained so that it causes flooding  
8 or anything else, and so oftentimes when they're  
9 doing that they will place arrows on maps, and it  
10 was my impression -- because I couldn't see from  
11 any of these other documents that there was  
12 actually a stream there, I got the impression over  
13 time that that was simply showing where they  
14 intended water to be conveyed through the outlot.

15 In my work, I'm always very careful to  
16 characterize water resources exactly as I see  
17 them, and this I characterized as a drainageway,  
18 not a stream, so I didn't want to call it a  
19 stream.

20 Q Okay. If you would, please, looking at page 4 of  
21 your report, if you could identify each of the  
22 documents that you reviewed relative to the nature  
23 of "Stream C," please. And I need to have you  
24 just reference them and tell us what they are.

25 A Certainly. On page 4, starting about in the

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1 middle, the first document I list is the *Surface*  
2 *Water Resources of Rusk County*. The Flambeau Mine  
3 is in Rusk County. These were documents that were  
4 developed for each county by the DNR, and as I  
5 noted in talking about my background, I actually  
6 worked on the one for Dane County. As time went  
7 on they didn't get used quite as often, but this  
8 was a nice source to look at, back before the mine  
9 was built was there anything in that area that was  
10 referred to as a stream, and in these surface  
11 water resource documents they will identify  
12 unnamed streams by a numeric code, at least show  
13 them on a map. There was nothing shown on the map  
14 in the area where Stream C had been indicated on  
15 some of the Foth design documents, nor was there a  
16 listing of any unnamed stream in that  
17 particular -- I believe they're named by section  
18 and quarter section, and there was nothing in that  
19 area.

20 The next resource was the Rusk County  
21 Geographic Information Web Server, and those maps  
22 I've actually shown -- that's what I used to index  
23 my photos in Exhibit 173. And as you can see on  
24 the overview, which is the top figure, the first  
25 figure on the first page of Exhibit 173, in the

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1 vicinity of aerial, where it says aerial A indexed  
2 on the overview, there is no stream shown. You  
3 can see what they look like lower on that same  
4 figure. It's a blue line, or it could be a dashed  
5 blue line I think if it's shown as an intermittent  
6 stream, but neither appears on this map in the  
7 area that had been identified as Stream C on the  
8 Foth design documents.

9 And the next bullet is USDA Natural Resource  
10 Conservation Service Web Soil Survey. It's been  
11 my experience over time that NRCS, formerly the  
12 SCS, or Soil Conservation Service, they tend to  
13 show the most waterways and the smallest  
14 waterways, so I thought it was important to check  
15 that, but it wasn't shown on that either.

16 USGS 7.5-minute Ladysmith Quadrangle, again  
17 that was a 1971 document and I thought that would  
18 be useful to see what had occurred earlier on the  
19 site, and there was no waterway -- and, again, I  
20 wasn't looking for something that said Stream C.  
21 I was looking on all of these documents for a  
22 symbol that showed that there was any kind of  
23 waterway there, and it wasn't on the USGS.

24 I looked on the DNR Surface Water Data  
25 Viewer, and I accessed that in October of 2011,

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1 and that shows again blue lines or dashed blue  
2 lines and I wasn't -- I did not see a stream noted  
3 on that source.

4 Getting down to the next bullet, the  
5 *Navigability of Flambeau River Tributary Streams*  
6 *in the Kennecott Project Area, Rusk County*, the  
7 memo which I incorrectly dated here, it's a 1988  
8 memo, November 23rd, 1988, not 2011, that a  
9 Mr. Jasinski of the DNR wrote after he had been up  
10 in the field looking at this area doing a  
11 navigability determination, and he noted that he  
12 felt that the stream was navigable for 1,000 to  
13 1,500 feet upstream of the Flambeau River, and  
14 measuring that out puts the uppermost origin south  
15 of Copper Park Lane, by quite a bit.

16 Then I looked at the *Wetland Inventory and*  
17 *Assessment of the Kennecott Flambeau Project*,  
18 which is a Foth document from March 1989, and  
19 showing Wetland Area 5. They had had somebody do  
20 a delineation at that point, I think it was  
21 Applied Ecological Services who did that  
22 delineation, and it was shown as Wetland Area 5,  
23 and that's the area of interest just adjacent to  
24 the east of the biofilter, and that characterized  
25 the area east of the biofilter as the "headwaters

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1 of a tributary to the intermittent stream  
2 designated as 'C' but they don't mention there  
3 being a waterway through the wetland itself, nor  
4 do they show it.

5 I am on page 5 of Exhibit 164 looking at the  
6 second-to-the-last bullet at the top, and this  
7 gets us to the Stantec Consulting Services *Wetland*  
8 *Delineation Report* that was done for  
9 the industrial outlot. The report was dated  
10 February of 2011. The field work was conducted on  
11 May 17th of 2010, and my colleague observed  
12 Stream C beginning -- what I've said here is  
13 downstream of the small culvert under the access  
14 road located north of Copper Park Lane. I believe  
15 that I -- I looked at that report but I had also  
16 talked to my colleague, and I think I had a  
17 misunderstanding of what his conclusion was,  
18 because after looking at the report later on, he  
19 does say that he saw a continuous channel south of  
20 the access road culvert, so that would be in the  
21 southern part of what he's called I think  
22 Wetland 7 in that report, so between that stub  
23 access road and Copper Park Lane. I did not see  
24 anything in that area when I did my field work,  
25 however.

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1 One more. The Bioassessment of Stream C, the  
2 Flambeau Mine Project, dated May 24/25, 2005,  
3 which was done by Blue Iris Environmental, that  
4 report states that the "stream flow upstream of  
5 Copper Park Lane is unchannelized."  
6 So essentially I took this body of knowledge  
7 and my observations, and then I concluded what is  
8 shown in the middle of page 5, that there is no  
9 defined waterway upgradient, or north, of Copper  
10 Park Lane. And when I did see an actual waterway  
11 begin south of Copper Park Lane, it was very  
12 intermittent flow, and that -- well, actually I'm  
13 making -- these conclusions are not just from  
14 those reports that I just talked about. They're  
15 from a combination of what I was able to glean  
16 from those reports and my actual observations in  
17 the field on the 18th of October.  
18 Q And then looking at the third, what was your third  
19 observation there?  
20 A The third observation was that looking at the  
21 character of the stream channel itself running  
22 from Copper Park Lane down to the Flambeau River  
23 where I saw dry portions, segments that were dry,  
24 based on my experience and what I've seen in the  
25 field over the years, it looked like there was

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1 probably continuous flow for less than three  
2 months at a time.  
3 MR. VAN CAMP: Would people like to  
4 take a break?  
5 THE WITNESS: I would.  
6 MR. VAN CAMP: We've been at it for  
7 a little over an hour here.  
8 MR. SAUL: Yeah, that would be  
9 great.  
10 MR. VAN CAMP: Okay. We'll take a  
11 break at this time.  
12 VIDEOGRAPHER: Going off the record  
13 at 10:32. We'll resume on DVD number 2.  
14 (Recess)  
15 VIDEOGRAPHER: We're back on the  
16 record, DVD number 2, at 10:49.  
17 Q Just before the break you expressed some opinions  
18 that appear in your report, and I'd just like to  
19 ask you if those opinions were expressed to a  
20 reasonable degree of certainty within your  
21 profession.  
22 A Yes.  
23 Q The next section of your expert report is entitled  
24 jurisdictional issues. Can you tell us what you  
25 have included in your report regarding

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1 jurisdictional issues?  
2 A Well, first I just kind of describe what I'm  
3 talking about and that the Clean Water Act applies  
4 to waters of the U.S. and that it was clarified in  
5 the regulations that were published after the  
6 Clean Water Act was passed in ways which I outline  
7 here. And then I go into how I see that applying  
8 to the Flambeau River, the drainageway called  
9 Stream C, and the wetland to the east of the  
10 biofilter and then the biofilter overflow itself,  
11 and I'm working back upgradient because it's  
12 all -- the jurisdiction is tied into the  
13 Flambeau River and the relationship of the various  
14 water resources to that water.  
15 Q Okay. First of all, can you describe what a water  
16 of the United States is? Where does that term  
17 come from?  
18 A Well, as I just said, the term comes from the  
19 Clean Water Act that was enacted in 1972, and it  
20 wasn't defined in the legislation but they defined  
21 it in regulations, the joint regulations that the  
22 EPA and the Corps of Engineers developed after the  
23 Clean Water Act was passed, and I'll just go  
24 through in general the way they are described in  
25 that -- in those regulations.

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1 It talks about -- and I've got that written  
2 down on page 6 of Exhibit 164. It's the waters  
3 that are used now, in the past, or may be  
4 susceptible to use in interstate or foreign  
5 commerce, and so it kind of starts with waters  
6 that are subject to the ebb and flow of the tide  
7 and then all interstate waters, including  
8 interstate wetlands, and then intrastate waters  
9 that are -- that if they're used, degraded or  
10 destroyed could affect interstate or foreign  
11 commerce, and they include that kind of commerce,  
12 examples, of used by interstate or foreign  
13 travelers for recreation or other purposes, waters  
14 from which fish or shellfish could be taken and  
15 sold in interstate or foreign commerce, and ones  
16 that could be used for -- waters that could be  
17 used for industrial purposes by industries in  
18 interstate commerce.  
19 Also waters of the U.S. is said to include  
20 impoundments of waters that are described in this  
21 bunch of definitions: Tributaries of water  
22 that -- waters that are identified in these  
23 descriptions, the territorial sea, and "wetlands"  
24 adjacent to waters that are identified in here.  
25 So that's -- this forms the basis of what is

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1 now called, after Rapanos, traditional navigable  
2 waters, or TNWs. So we were looking before at  
3 this list of navigable waters, Exhibit 172. That  
4 is really the portion -- that's kind of a subset  
5 of this definition that was put in the Clean Water  
6 Act, but actually, yeah, it's kind of irrelevant  
7 because it's Section 10 waters which is a  
8 completely different piece of regulation.

9 But what I'm getting at is it's not just  
10 those waters that are navigable that are included  
11 in waters of the U.S. The key is this first  
12 issue, waters that are currently used, were used  
13 in the past, or may be susceptible to use in  
14 interstate or foreign commerce, and because of  
15 that, even though the Flambeau River isn't  
16 included on that list of navigable waters in  
17 Exhibit 172, it does meet the definition of a  
18 water of the U.S. because it is a traditional  
19 navigable waterway as defined in the 2008  
20 jurisdictional guidance. And, for that matter,  
21 the draft jurisdictional, because it may be  
22 susceptible to use in interstate or foreign  
23 commerce.

24 In other words, the Flambeau River can easily  
25 be navigated by all kind of recreational vessels,

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1 kayaks, canoes, and people take fishing trips on  
2 the river and they could be people from out of  
3 state or they could be vessels that are, you know,  
4 rented in the area or rented somewhere else or  
5 bought somewhere else and brought in. So, anyway,  
6 that easily fits that definition. The  
7 Flambeau River fits the definition of a  
8 traditional navigable waterway.

9 Do you want me to go on through Stream C  
10 here?

11 Q Please.

12 MS. MC GILLIVRAY: I'm going to  
13 object to the form of the question and also  
14 to the extent that it calls for a legal  
15 conclusion.

16 A What question?

17 Q First of all, let me have you take a look at  
18 another document that was marked in your prior  
19 deposition as Exhibit 165. You made a reference I  
20 believe -- It is marked in a prior deposition as  
21 Exhibit 165, I believe.

22 MS. MC GILLIVRAY: That's correct,  
23 Counsel.

24 MR. VAN CAMP: I've got copies if  
25 you want them.

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1 Q I believe you made a reference to guidelines  
2 moments ago; correct?

3 A Yes. I referenced the 2008 jurisdictional  
4 guidelines, and that's what Exhibit 165 is, Clean  
5 Water Act Jurisdiction Following The U.S. Supreme  
6 Court's Decision in *Rapanos v. United States* and  
7 *Carabell v. United States*.

8 Q Is this, Exhibit 165, a document that you're  
9 familiar with?

10 A Yes. It's a document that I use to consider -- to  
11 make preliminary determinations for my clients  
12 about whether or not the Corps of Engineers is  
13 likely to take jurisdiction over a wetland.

14 Q Is this a document that you were aware of before  
15 you were engaged to work on this project?

16 A Yes.

17 Q And for how long have you been aware of the  
18 guidelines represented in Exhibit 165?

19 A When it came out in 2008, it had been long-awaited  
20 at that point in time because *Rapanos* was -- their  
21 decision was, what, in 2006 or '07 -- yeah, 2006,  
22 and so during that time everybody was waiting to  
23 try to figure out how the Corps was going to apply  
24 the findings of that case to actual work in the  
25 field. So I knew about it when it came out.

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1 Q In connection with this case or the work that you  
2 did in this case, how, if at all, did you rely on  
3 Exhibit 165 and the guidelines represented  
4 therein?

5 A Well, because the plaintiffs had, I think had used  
6 navigability -- well, in any case, the case was  
7 about the regulatory status of a waterway, and so  
8 this is kind of the bible that you look at to get  
9 the detail of what is the current understanding of  
10 the agencies and their current guidance that they  
11 provide to the public about how to determine  
12 whether or not a wetland or a waterway or water of  
13 the U.S. is going to be regulated.

14 Q Okay. I'd like to draw your attention then to the  
15 captions under the jurisdictional heading, and the  
16 first one is the Flambeau River. And could you  
17 tell us what you have written in your report  
18 regarding the Flambeau River under that caption.

19 A Well, I've said that although it's not listed in  
20 Exhibit 172 as a navigable water, I felt it still  
21 meets the definition of a water of the U.S.  
22 because it meets the definition quite readily as  
23 defined, like I said before, in the 2008 guidance,  
24 which is Exhibit 165, and in even the draft  
25 jurisdictional guidance because, and I've quoted

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1 from -- what have I quoted that from, 25, from the  
2 guidance itself, from page 4 of Exhibit 165, and I  
3 can either read it from there or I can read it  
4 from what I quoted here, because the  
5 Flambeau River may be susceptible to use in  
6 interstate or foreign commerce, and I've given the  
7 reasoning as I described earlier, it's easily  
8 navigated by recreational vessels and they could  
9 very easily be vessels and people from out of  
10 state and it's just pretty basic that the  
11 Flambeau River appears to be a traditional  
12 navigable water as described in the guidance.  
13 Q Okay. And then you also make some observations  
14 about the watersheds, comparative watersheds of  
15 the Flambeau River and Stream C. What did you do  
16 in that regard?  
17 A Well, I simply looked at the relative sizes of the  
18 watershed of the lower Flambeau River which in  
19 the DNR's watershed websites they give as being  
20 128 square miles in extent, whereas the watershed  
21 of the drainageway known as Stream C has been  
22 measured at less than a half of one square mile.  
23 And the reason that I was going there was because  
24 of the significant nexus.  
25 I think I probably formed the basis earlier

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1 in this report but I'll talk about it now, that  
2 the basis for whether or not the waterway known as  
3 Stream C or its -- or the wetlands that flow into  
4 it are considered to have a significant nexus with  
5 a traditional navigable waterway has to do with  
6 whether there is more than a -- now I can't find  
7 where this is. Let me just look through here for  
8 a moment.  
9 Okay. On page 11 of my expert report, which  
10 is Exhibit 164, the basis for a significant nexus  
11 is whether there is a significant effect on the  
12 chemical, physical, and biological integrity of a  
13 traditional navigable waterway. So the Flambeau  
14 River being that TNW, what I was trying to start  
15 looking at is whether that effect of the watershed  
16 of Stream C being so small would have a  
17 significant effect, and I did not do that analysis  
18 but I did not see that analysis having been done  
19 by the plaintiffs, and so I was suggesting that  
20 one way to make that determination of significance  
21 is to conduct a mass balance analysis of the  
22 effect of any pollutants found in the stream, that  
23 being looking at the flow of a waterway, the  
24 concentration of a constituent in that waterway  
25 relative to the flow of water within that

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1 receiving water.  
2 Q Okay. And what did you find when you did that  
3 analysis?  
4 A I didn't do that analysis.  
5 Q Okay. And did you find that anyone else, in the  
6 materials you reviewed from the plaintiff, had  
7 done that?  
8 A In the materials I reviewed, I hadn't seen that  
9 type of analysis to determine level of  
10 significance of the chemical or biological or  
11 physical effect on the Flambeau River by Stream C.  
12 Q Just let me digress for a moment. Do you recall  
13 the plaintiffs' documents that you reviewed?  
14 A Yes.  
15 Q And what were they?  
16 A The plaintiffs' documents that I reviewed were the  
17 complaint itself, and I reviewed the expert  
18 reports of Mr. Chambers and Mr. Nauta, and I  
19 reviewed I think it was the deposition of  
20 Mr. Roesler. Those are primarily the documents,  
21 the plaintiffs' documents that I recall reviewing.  
22 Q All right. Next your report refers to "Stream C."  
23 Can you, please, tell us what your findings were  
24 with regard to "Stream C."  
25 A Well, in this section I'm just trying to

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1 characterize kind of how that monicker of Stream C  
2 came to be in my opinion, if there was --  
3 you know, I already talked about how there is all  
4 of these resources I reviewed and no stream  
5 existed in that area, so why are we calling this  
6 feature Stream C. Why are we calling it a stream.  
7 And I noted that a lot of the materials prepared  
8 by Flambeau Mining Company or its consultants,  
9 you know, they noted that the biofilter would  
10 discharge to Stream C, they labeled a lot of  
11 diagrams with Stream C, and my conclusion is that  
12 this name in itself didn't make it a stream, it  
13 simply was a way to show -- or it was simply a way  
14 to talk about a given water resource area. And I  
15 didn't feel, based on my observations and my  
16 review of the documents, that the plaintiffs had  
17 shown that the really small amount of discharge of  
18 water that I saw evidence of from the biofilter  
19 into the wetland, I just didn't see any evidence  
20 that it flows as surface water into anything that  
21 could be called Stream C, whether you're talking  
22 about Stream C beginning, you know, just west of  
23 Highway 27 or if you're talking about it starting  
24 anywhere between there and Copper Park Lane or  
25 even south of Copper Park Lane. I just was not

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1 seeing a connection there, a surface water  
2 connection between the very infrequent outflow  
3 from the biofilter and anything that people might  
4 have been referring to as Stream C. So that's  
5 essentially what I was trying to talk about there.  
6 And, again, this is in a section that --  
7 where I talked about jurisdictional issues  
8 associated with each component of the drainageway  
9 that's been named as Stream C.  
10 Q Okay. And what were those jurisdictional  
11 references?  
12 A Well, again, you know, I want to stress that  
13 nobody except the agencies can decide what is  
14 under their jurisdiction but they have, in fact,  
15 published guidance because they understand that  
16 people have to make plans and developers need to  
17 come up with a sense of whether they'll be allowed  
18 to move forward with a project or not and  
19 environmental consultants like myself typically,  
20 although we don't make legal determinations, we  
21 use the guidance that's been provided to the  
22 public by the agencies to figure out as close as  
23 we can whether a resource is going to be  
24 regulated -- is likely to be regulated by an  
25 agency.

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1 In the case of Stream C adjacent to the  
2 biofilter, I didn't see any features that have  
3 typically been defined as something that's  
4 regulated as a stream by the -- by either the  
5 Department of Natural Resources or the Corps of  
6 Engineers.  
7 The wetland itself, however, adjacent to --  
8 the wetland adjacent to the biofilter is regulated  
9 by the state of Wisconsin and very likely would be  
10 regulated by the Corps of Engineers, but in order  
11 to make that determination, according to their  
12 guidelines there needed to be a significant nexus  
13 evaluation done to make that determination.  
14 Q Okay. I'd like to draw you back to Exhibit 171.  
15 A Okay.  
16 Q In connection with what you just said, that a  
17 significant nexus determination would have to be  
18 made, could you tell us what Exhibit 171 is and  
19 what relationship that might have to that process?  
20 A Exhibit 171 is entitled Approved Jurisdictional  
21 Determination Form. It's a seven-page form which  
22 all of us in the field were a bit dismayed to see  
23 when it came out in association with the 2008  
24 guidance. I think it came out with that. It may  
25 have come out afterwards. But essentially it

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1 followed that guidance. And it is a very  
2 long-winded way of determining whether or not a  
3 wetland is subject to the jurisdiction of the  
4 Corps of Engineers after the Rapanos decision. It  
5 goes through and starts with the easy stuff. It  
6 just has you put down where the waterway -- or  
7 where -- yeah, where the water feature is located  
8 and where is the closest traditional navigable  
9 waterway, what watershed is the wetland in, and  
10 this is actually -- this is actually a way to  
11 determine whether a wetland is under the  
12 jurisdiction of the Corps.  
13 And so then the section II, it goes into  
14 whether or not you're in navigable waters of the  
15 U.S. under Section 10 of the Rivers and Harbors  
16 Act, and that's essentially the listing again  
17 that's in Exhibit 172. If you're not in that  
18 particular section, or area A of section II, which  
19 is the Section 10, then you go down to area B  
20 still on that first page, which is under Section  
21 404, and this is just a way to present all of the  
22 information that's available about how a wetland  
23 is situated relative to other waters so that the  
24 Corps of Engineers can make their determination.  
25 So they simply want you to say are there

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1 traditional navigable waters nearby, are there  
2 wetlands adjacent to those traditional navigable  
3 waters, are there relatively permanent waters, are  
4 there non -- relatively permanent water is one  
5 that's defined here on Exhibit 171 and in footnote  
6 2. It's a tributary that's not a traditional  
7 navigable waterway that typically flows year-round  
8 or has continuous flow at least seasonally. So  
9 that's a relatively permanent water, at least  
10 seasonally meaning, it says, for example typically  
11 three months. So they talk about in this -- under  
12 number 1 of section II B of Exhibit 171 they talk  
13 about non-RPWs, so those would be waterways that  
14 flow less than three months of the year.

15 So this is why I reviewed these types of  
16 issues when I was in the field and using other  
17 documents that had been put together about the  
18 project area, so that -- you know, I was trying to  
19 look at issues that go into this jurisdictional  
20 determination. That's just the first page.

21 The second page has section III where they  
22 want to know about -- where they talk about the  
23 Clean Water Act analysis, and that's where you get  
24 into the really fine points: Is it a traditional  
25 navigable waterway, is it a wetland adjacent to a

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1 traditional navigable waterway, how is it  
2 adjacent, and they want you to put down a lot of  
3 information about the characteristics of the  
4 tributary and if it's not a traditional navigable  
5 waterway and any adjacent wetlands.  
6 It talks about the watershed size and,  
7 you know, what the precipitation is in the area,  
8 what its physical characteristics are, how many  
9 miles from a traditional navigable waterway, how  
10 many miles from a relatively permanent waterway.  
11 It wants you -- The next page it wants you to talk  
12 about the characteristics of the tributary.  
13 So these are all the kinds of observations  
14 that I made when I was out there. But it gets  
15 even more detailed as it goes along talking about  
16 the flow and talking about chemical  
17 characteristics of the wetland and any waters it  
18 flows into, and they're doing that because they're  
19 trying to determine if -- as is stated in the  
20 definition of a significant nexus, does it have  
21 significant effects on the physical, chemical and  
22 biological characteristics of the traditional  
23 navigable waterway.  
24 Q Just let me stop you for a moment. The closest --  
25 What is the closest traditional navigable waterway

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1 to this wetland?  
2 A My interpretation is that it's the Flambeau River.  
3 Q Is this wetland adjacent to the biofilter adjacent  
4 to the Flambeau River?  
5 A It would have to be much closer to the  
6 Flambeau River than it is. My interpretation of  
7 the regulations is that it is not adjacent to the  
8 Flambeau River.  
9 Q Now in your review of the expert reports submitted  
10 by the plaintiffs' experts, Mr. Chambers and  
11 Mr. Nauta, were you able to determine whether  
12 either Mr. Chambers or Mr. Nauta went through the  
13 steps that you have been describing as components  
14 of Exhibit 171 to conduct such a nexus test?  
15 A There were pieces of it, but it wasn't as complete  
16 as, my understanding, is required. You know, it  
17 wasn't systematically aimed at determining whether  
18 there was significant biological, chemical or  
19 physical -- what is the terminology, significant  
20 effects of chemical, physical and biological  
21 integrity of downstream traditional navigable  
22 waterways. I did not see -- I did not think that  
23 the materials that I reviewed constituted a  
24 complete significant nexus determination.  
25 According to what I've -- my understanding of the

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1 guidelines, my experience having done them in the  
2 past, I didn't see that it had been done.  
3 Q I would like to take a look at the next area of  
4 your report that refers to the wetland north of  
5 Copper Park Lane. What were your findings related  
6 to that?  
7 A Well, I was talking about how I went out in the  
8 field and I searched very carefully, as I'd  
9 described earlier, and that that wetland north of  
10 Copper Park Lane didn't seem to encompass a  
11 tributary of any sort, and my conclusion there,  
12 again based on public guidance put out by the  
13 Corps of Engineers to assist people in determining  
14 whether they have a jurisdictional resource, I  
15 didn't feel that -- I felt that in order to figure  
16 out if that wetland was regulated by the Corps  
17 that a significant nexus analysis would be  
18 necessary.  
19 Q Would you describe, just describe what the wetland  
20 was that you saw.  
21 A The wetland east of the biofilter is essentially a  
22 seasonally saturated wetland, which means that the  
23 water table is not -- is typically at or below the  
24 surface. Certainly in very wet times, and I've  
25 seen photos since that show that there can be

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1 water above the surface of the landscape in some  
2 points, and in fact we did run into an area that  
3 had a small amount of standing water, but, yeah,  
4 it's characterized by predominance of reed canary  
5 grass, which is a nonnative grass, and probably  
6 was a sedge meadow in the past which is  
7 characterized by the hummock-and-hollow kind of  
8 microtopography. When you're walking through, you  
9 kind of trip over these little humps of grass.  
10 And, you know, that's essentially it.  
11 Q Okay. Now next you talk about observations  
12 involving the biofilter overflow. Would you  
13 describe that for us?  
14 A Yes. As I had mentioned before, I was looking  
15 hard to find some kind of continuous waterway  
16 flowing out of the biofilter, and given my  
17 training in hydrology and all of my wetlands work,  
18 I'm not thinking that I'm going to see a  
19 continuous line of flowing water at any given time  
20 that I go out to a site but I'm looking for  
21 evidence of that type of flow. And looking on the  
22 outside face of the biofilter overflow and the  
23 outside of the berm on the east side, I did see  
24 small areas of erosion caused by the flow of  
25 water, but it was discontinuous, it was barely

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1 noticeable, barely perceptible in many areas, and  
2 that is -- in the 2008 guidance it says that the  
3 agencies generally will not assert jurisdiction  
4 over swales or erosional features, gullies, small  
5 washes characterized by low volume, infrequent or  
6 short duration flow. That's reading a quote from  
7 the 2008 guidance, which is Exhibit 171 -- I'm  
8 sorry, 165, and it's on page 1.  
9 So as far as the biofilter overflow, what I  
10 saw was not very much. I did not see a continuous  
11 flow or any evidence of such moving down the face  
12 of that berm, and certainly when we got to the  
13 bottom of the berm where the wetland occurs and  
14 the topography evens out, there was no waterway  
15 whatsoever. No surface water, no evidence of  
16 surface water flowing out regularly toward the  
17 center of that wetland, which is -- you know, the  
18 lowest points are in the center of the wetland.  
19 Q So, first of all, how wide approximately was the  
20 lowest part of the biofilter? Do you recall how  
21 wide that was roughly?  
22 A The lowest part of the biofilter?  
23 Q Meaning the outlet of the biofilter. How wide an  
24 area is that? Describe that.  
25 A You know, the berm of the biofilter is a sloping

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1 feature that from the top of the berm to the base  
2 of the berm is probably 10 or 12 feet of distance.  
3 Q And what is the surface of that?  
4 A The surface of that berm is -- in some areas it  
5 has rocks, but that's mostly at the top where the  
6 lip is, where the actual overflow, and it's just  
7 soil, a lot of mineral soil.  
8 Q Okay. And how far is it from the bottom of that  
9 biofilter berm in the outlet area to the lowest  
10 part of the wetland that you just previously  
11 described?  
12 A I'm sorry, to the lowest -- well, let me just kind  
13 of describe it. I think that's what you're  
14 getting at.  
15 From the top of the overflow area of the  
16 biofilter to the base of the berm is, like I said,  
17 about 10 to 12 feet, and then the wetland starts.  
18 And then to the area that most people have  
19 referred to as Stream C, which is the lowest part  
20 of that adjacent wetland, it's probably another  
21 maybe 15 to 20 feet over to that lowest area from  
22 the base of the berm. But I did not take an exact  
23 measurement. I'm just talking from memory.  
24 Q Now after you reviewed the documents that you have  
25 referenced and you visited the site and you

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1 examined it, did you reach any conclusions?  
2 A Yes, I most certainly did.  
3 Q Could you tell us what those conclusions or  
4 opinions are?  
5 A Okay. I felt like -- The conclusion I reached was  
6 that the pollutants -- any copper or other  
7 chemical constituents that they were concerned  
8 about in the biofilter being discharged to  
9 navigable waters or waters of the U.S. I felt was  
10 unsupported because I was not seeing a physical  
11 channel or waterway that ran along the area that  
12 had been termed Stream C. I wasn't able to see a  
13 stream coming down from the biofilter into the  
14 wetland. It certainly does discharge to that  
15 wetland occasionally, but I didn't see any obvious  
16 evidence that the wetland drainageway that's  
17 referred in documents to -- referred to as  
18 Stream C in a lot of documents, I didn't see that  
19 evidence was presented that would show that either  
20 that drainageway or that wetland constitute waters  
21 of the U.S. because waters of the U.S., it's my  
22 understanding that in Section 402, as well as in  
23 Section 404, the term waters of the U.S. is what  
24 is regulated under those -- under both those  
25 sections. And it's my understanding, based on the

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1 guidance that the Corps and the EPA have provided  
2 to the public, that being essentially Exhibit 165,  
3 that there needs to be a significant nexus  
4 established between those waters and the -- and a  
5 traditional navigable waterway.  
6 And as I've said before, I'm not making any  
7 legal distinction, but using the readily available  
8 guidance that is typically utilized by consultants  
9 like myself, other professionals like myself,  
10 those analyses have not been completely  
11 established, or have not been completely followed  
12 enough to establish that a significant nexus  
13 exists between the biofilter and the Flambeau  
14 River.  
15 Q Okay. Drawing your attention to items that you  
16 have numbered under your conclusions, item number  
17 1 refers to an on-site evidence of a physical  
18 channel or waterway running between Highway 27 and  
19 Copper Park Lane. What was your conclusion about  
20 that?  
21 A Well, I concluded that using the map resources,  
22 such as the USGS topo maps and the DNR Surface  
23 Water Data Viewer and the Soil Survey that the --  
24 the references that I have referred to earlier in  
25 the testimony, those resources that typically show

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1 the location of waterways, both permanent and  
2 intermittent, nothing appeared in the area that is  
3 typically labeled on the Foth design documents as  
4 Stream C, and I really feel that it's important to  
5 note that that is simply a label that's become a  
6 convenient means for referring to a general  
7 drainage pathway for the conveyance of water from  
8 one end of a watershed to the other.  
9 And adjacent to the biofilter, this  
10 drainageway that's commonly referred to as  
11 Stream C, really it's physically represented by  
12 simply a headwaters wetland and it's not actually  
13 observable as a defined waterway in that  
14 particular location. I did not observe a defined  
15 waterway in that location. So that's how I  
16 reached that conclusion.  
17 Q And then item number 2 refers to biofilter  
18 discharge point. What conclusion did you reach  
19 with regard to the biofilter discharge point?  
20 A Well, the evidence that I observed in the field is  
21 that you do get some -- there is occasionally some  
22 overflow of the biofilter, just as it was designed  
23 to do, when there is high levels of water or a lot  
24 of precipitation but that discharge from the  
25 biofilter is such a small amount that it rarely

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1 flows along the same path enough to create a  
2 defined channel down the face of the berm, and  
3 when it gets to the wetland at the base of the  
4 berm, it appears to spread out or possibly  
5 infiltrate into the ground at this point because  
6 there just is no evidence of a channel extending  
7 from the base of the berm toward the east, which  
8 would be the lowest point. It's quite flat. The  
9 wetland is quite flat. But if you had enough  
10 drainage, enough quantity and frequency of  
11 drainage, there would be a scoured waterway that  
12 would be in evidence, and that was not the case.  
13 Q Now with regard to the flow, if at all, out of the  
14 wetland, were you able to locate, either in the  
15 materials provided by the plaintiffs, the  
16 plaintiffs' experts or any other of the printed  
17 materials you reviewed, quantitative information  
18 about the flow out of that wetland?  
19 A I did see some quantitative information about  
20 flows that somehow had been associated with  
21 Stream C. The connections and the actual sources  
22 and locations of that information were not  
23 well-defined. And so anyway, yeah, that's all I  
24 want to say about that.  
25 Q Okay. How often does the flow come out of the

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1 wetland to the east of the biofilter or was there  
2 any information available about that?  
3 A How often does flow go from where to where?  
4 Q From the wetland area that is to the east of the  
5 biofilter out of that. Is there any information  
6 available about that?  
7 A You know, some of the information that I've seen  
8 has shown flow occurring, but as far as the  
9 frequency of that flow and the quantity of that  
10 flow, again there hasn't been -- it wasn't -- my  
11 impression is it was something that was not -- it  
12 was a piece of information that was not  
13 particularly needed, and now that we're needing to  
14 look at that, it really doesn't exist. This is an  
15 area that hadn't been looked at in this -- much  
16 under a microscope before, so some of the flow  
17 information that's available is just -- it's not  
18 specific enough to a given point to be able to  
19 tell exactly how often this flows out.  
20 Q Would that be information that you would need to  
21 conduct a significant nexus test?  
22 A That's part of it. But as I pointed out before,  
23 it's quite a large -- I never even got through the  
24 seven-page form. It gets more and more detailed  
25 as you go onward through that Exhibit 171.

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1 Q Okay. Could you tell us whether or not the  
2 opinions and conclusions that you've reached and  
3 that you've testified about here today have been  
4 expressed by you to a reasonable degree of  
5 certainty within your profession?  
6 A Yes, they have.  
7 MR. VAN CAMP: Okay. Let's take a  
8 short break.  
9 VIDEOGRAPHER: Going off the record  
10 at 11:41. We'll resume on DVD number 3.  
11 (Recess)  
12 VIDEOGRAPHER: And we're back on  
13 the record at 12:01, DVD number 3.  
14 Q I think the questions and responses thus far I've  
15 focused on the area to the north of Copper Park  
16 Lane. Did you make any observations to the south  
17 of Copper Park Lane?  
18 A Yes.  
19 Q Why don't you describe for us what you did and  
20 what you observed south of Copper Park Lane.  
21 A On the 18th of October we followed the track of  
22 the waterway all the way down to the Flambeau  
23 River, and as I've talked about before on  
24 Exhibit 173, starting on the second page, I've  
25 essentially drawn in, as near as I could see,

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1 where that waterway is. And if you look on the  
2 second page of that Exhibit 173, the top image,  
3 there is actually a couple of tributaries even  
4 going into that waterway. There is one just to  
5 the right of where photo 21 is shown and there is  
6 one to the right of where photo 22 is shown. Both  
7 of them are very small. They were dry.

8 But describing going downstream, some of the  
9 photos I've taken show that right below the  
10 culvert that's under Copper Park Lane, as I noted  
11 before, this photo 14 shows it kind of looks like  
12 it's not even a channel there. It kind of looks  
13 like a dry field. In fact, it was odd. It was a  
14 little bit of a high point, but as you turn  
15 around, then all of a sudden the actual waterway  
16 starts, and it's pretty darn narrow. Where you  
17 can see on photo 16, I mean it's only a foot and a  
18 half across there. It's about, I don't know, a  
19 few inches deep, but you can see it. And then as  
20 you go downstream, and some of those ephemeral  
21 drainageways flow in, photo 18 you can see that  
22 Stream C gets a little bit wider, there is some  
23 standing water in it, a few places it's flowing.  
24 At photo 20 there is actually a little area of  
25 ripples where you can see the flow because it's a

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1 slightly steeper gradient. Then you have a little  
2 bit further downstream where photo 21 shows it  
3 kind of looks like -- it's very flat in there so  
4 it meanders around. It's got oxbows.

5 And then it goes kind of through some steeper  
6 valleys, and I actually walked along the top of  
7 the area and just looked down on it. Some  
8 sections are quite rocky and, you know, there is  
9 no standing water, no flow across them, and  
10 obviously there is still conveyance of water  
11 through that area. It's simply kind of down  
12 underneath the ground.

13 And then when you get to the confluence of  
14 Stream C with the Flambeau, as you can see in  
15 photo 23, there is a little bit of inlet of water  
16 that looks like it's connecting with the stream  
17 but just above that, just on the left side of the  
18 photo, there is a very steep area. It probably  
19 goes up about a foot to a foot and a half in  
20 elevation over a distance of maybe 5 to 10 feet,  
21 and, you know, it's almost like you would probably  
22 have a waterfall there if there was much water  
23 flowing, and that's what's represented by the  
24 confluence. It's not a real continuous mouth,  
25 whereas in this photo 23, the people up in the

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1 upper left-hand corner are at the mouth of the  
2 stream that is depicted on this Rusk County  
3 Geographic Information Web Server and is on the  
4 top image on the first page of Exhibit 173. The  
5 mouths of those two streams are very close  
6 together in that area, and the one that's marked  
7 there, I forget, I think it has a name but I  
8 forget the name of it, that has a continuous -- I  
9 mean the water between the Flambeau River and that  
10 stream are at the same elevation for quite a  
11 distance upstream. I mean obviously there is a  
12 slight change in elevation but it's much more of a  
13 connection with the Flambeau. Is that what you  
14 were interested in hearing about?

15 Q Sure. And I would like to take you back to  
16 photograph number 16 in Exhibit 173.

17 A 16, yes.

18 Q The caption there is uppermost reach of continuous  
19 channel. Tell us what you mean by continuous  
20 channel.

21 A That's where you have a bed and a bank that is  
22 obviously scoured by the movement of water that  
23 happens with enough frequency and duration to  
24 actually maintain that continuous channel. A  
25 continuous feature that's characterized by a

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1 definite -- a well-defined bed and bank over a  
2 consistent area, not just a little bit here and a  
3 little bit there like I was describing adjacent to  
4 the culverts. This one goes on from this point  
5 all the way down to the Flambeau River. Whether  
6 it has water in it or not, it's still a defined  
7 channel.

8 Q Okay. What do you mean by uppermost?

9 A Well, this is -- you know, you can see how narrow  
10 it is in 16, in photo 16. I think it's possible  
11 that photo 15 -- yeah, I guess photo 15 actually  
12 is upstream, so that was a completely dry portion,  
13 although you could see -- you could see a bed and  
14 bank but then there was a portion down below it  
15 where you couldn't see it, so at this point where  
16 photo 16 is, that's the first point at which I saw  
17 an actual channel that just went on from there  
18 down to Flambeau without interruption.

19 Q Approximately how far was the area depicted in  
20 number 16 as the uppermost reach of the continuous  
21 channel? How far is that from the south side of  
22 Copper Park Lane where the culvert comes out?

23 A From where the culvert comes out, I unfortunately  
24 do not have a scale on here, but thinking back to  
25 it, oh, maybe from the culvert to that bend is

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1 about 4 to 6 feet and then from the bend over to  
2 where this continuous channel started is probably  
3 15 to 20, as much as 25 feet.  
4 Q In the plaintiffs' expert reports that you  
5 reviewed, and again those would be the Chambers  
6 and Nauta reports, did you see any continuous  
7 nexus report contained within their reports of a  
8 connection between the Flambeau River and  
9 Stream C? Did you see an analysis of that?  
10 A Of a significant nexus?  
11 Q I'm sorry, a significant nexus.  
12 MS. MC GILLIVRAY: Objection,  
13 vague.  
14 Q Sorry. Yes. Let me restate the question. In the  
15 reports that you reviewed, did you see an analysis  
16 by the plaintiffs' experts of a significant nexus  
17 between the Flambeau River and Stream C?  
18 A No.  
19 Q And is that your opinion to a reasonable degree of  
20 certainty related to your profession?  
21 A Yes.  
22 Q And with regard to the photographs in Exhibit 173  
23 and your description of what the photographs show  
24 south of Copper Park Lane, were those opinions  
25 expressed by you to a reasonable degree of

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1 certainty within your profession?  
2 A Yes.  
3 MR. VAN CAMP: Okay. Thank you  
4 very much. I appreciate your time, and I  
5 have no further questions.  
6 THE WITNESS: Okay.  
7 MS. MC GILLIVRAY: Thank you. I  
8 have some cross-examination.  
9 CROSS-EXAMINATION  
10 By Ms. McGillivray:  
11 Q Ms. Day, as you know from Friday's deposition, my  
12 name is Pam McGillivray, and I'm one of the  
13 attorneys for the plaintiffs. Even though we've  
14 been through much of this already yesterday and  
15 earlier today, I have a few follow-up questions  
16 for you.  
17 A Okay.  
18 Q Just to begin with, to understand terminology,  
19 because there has been a few different terms used  
20 here and I just want to understand the  
21 relationship to each other, you used the term  
22 water of the United States, and I think, as you  
23 stated, that's a term from the Clean Water Act;  
24 correct?  
25 A Yes.

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1 Q Okay. And in your report you identified that as a  
2 term that's used at 33 U.S.C. Section 1362(7).  
3 Are you familiar with that provision in the Clean  
4 Water Act?  
5 A Yes.  
6 Q You also used the term jurisdictional water here  
7 today; correct? Is that the term that you used?  
8 A Jurisdictional -- well, can you show me where I  
9 said that?  
10 Q Sure. Well, I believe --  
11 A Or -- I don't know.  
12 Q You've used the term jurisdictional determination.  
13 A Determination, yes.  
14 Q Okay. When you make a jurisdictional  
15 determination, are you making a determination that  
16 the waterway is a water of the United States?  
17 A Am I -- I'm making a preliminary determination in  
18 that regard, yes. That is what the purpose of a  
19 jurisdictional determination is.  
20 Q Okay. So I understand that you have stated that  
21 it's actually up to the agencies, the Army Corps  
22 of Engineers or the United States Environmental  
23 Protection Agency, to make the final determination  
24 on whether or not the waterway is a jurisdictional  
25 waterway; correct?

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1 A Yes.  
2 Q But in your profession you apply the guideline,  
3 such as the 2008 guideline that you've talked  
4 about today, to make a preliminary determination  
5 of whether or not the waterway you're examining is  
6 a water of the United States?  
7 A That's correct.  
8 Q Okay. And so let's go back to your report, which  
9 is Exhibit 164. Do you have that in front of you?  
10 A Yes.  
11 Q Okay. We had talked about this earlier, but to go  
12 through it again today, you have relied on various  
13 documents that you have listed on pages 4 and 5 of  
14 your report and you talked about them today with  
15 Mr. Van Camp. You identified them with  
16 Mr. Van Camp. I want to get a little bit further  
17 information about some of them.  
18 A Okay.  
19 Q And the first three, which are the web server  
20 maps, maybe -- strike that. The first four are  
21 maps that are available and you cite them for the  
22 fact that they do not identify Stream C; correct?  
23 A That's correct.  
24 Q So your reliance on them is for the absence of a  
25 stream, not for any affirmative information?

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1 A I looked at them to try to see if there was a  
 2 stream but I was unable to -- or they didn't  
 3 appear on there.  
 4 Q Okay. So on those first four sources they didn't  
 5 appear, and that was significant in your review?  
 6 A Exactly.  
 7 Q Okay. The next document that you list is the  
 8 November 23rd, 1988, Jasinski memorandum which has  
 9 already been marked as an exhibit earlier as 167,  
 10 which I believe you should have.  
 11 A I don't.  
 12 MS. MC GILLIVRAY: Do you have it?  
 13 MR. VAN CAMP: I don't have it, but  
 14 okay.  
 15 MS. MC GILLIVRAY: Can we go off  
 16 the record for a second?  
 17 VIDEOGRAPHER: Going off the record  
 18 at 12:17.  
 19 (Discussion held off record)  
 20 VIDEOGRAPHER: We're back on the  
 21 record at 12:23.  
 22 MS. MC GILLIVRAY: Thank you.  
 23 Q So I'm going to hand you what's been marked as  
 24 Exhibit 167 from your deposition on Friday, and  
 25 earlier you identified that -- as the fifth source

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1 that you listed in your report at page 4 the  
 2 November 23rd, 1988, Jasinski memorandum.  
 3 A Actually the sixth bullet. Anyway, yes.  
 4 Q I did count those bullets incorrectly. Thank you.  
 5 A Okay.  
 6 Q So the first five sources then are the mapping  
 7 sources; correct?  
 8 A Yes.  
 9 Q And those -- As we discussed, those five you  
 10 listed because you did not find a Stream C  
 11 identified on any of those mapping sources?  
 12 A That's correct. Those are the sources that I  
 13 typically look at, and I didn't find the stream.  
 14 Q Okay. So the sixth source is the memo that I just  
 15 handed you that's been marked as Exhibit 167.  
 16 A Correct.  
 17 Q And you reviewed the memo and made -- and  
 18 interpreted the memo to stand for the fact that  
 19 the uppermost origins of Copper Park Lane  
 20 Stream C -- strike that. That Stream C is  
 21 navigable only at the lower 1,000 to 1,500 feet  
 22 upstream from the Flambeau?  
 23 A Correct.  
 24 Q And this memo provides other information that you  
 25 didn't consider in making your conclusions;

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1 correct?  
 2 A I'm sorry, what?  
 3 Q The memo, Exhibit 167, contains other information  
 4 about Stream C that you didn't include in your --  
 5 as a basis of your opinion?  
 6 A That's correct.  
 7 Q Including the fact that the writer mentions past  
 8 channelization of Stream C; correct?  
 9 A Where is that?  
 10 Q In that same paragraph marked -- or that starts  
 11 with Stream C, in the third sentence, "This is  
 12 probably the result of past channelization and  
 13 also this year's drought." The fact that the  
 14 author was referring to channelization at all was  
 15 not something that you relied on in drafting your  
 16 report?  
 17 A No. I, in fact, discounted it.  
 18 Q And he also notes that Stream C was barely  
 19 discernible where it crosses Highway 27. That  
 20 also was something that you did not rely on in  
 21 reaching your opinions; correct?  
 22 A Well, I didn't rely on it, but I agree with that  
 23 statement. That's what I observed, the stream  
 24 channel was barely discernible where it crosses  
 25 Highway 27. There is no -- there is no channel

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1 there.  
 2 Q You agree with the statement that the channel was  
 3 barely discernible?  
 4 A I don't think that there was -- I guess I agree  
 5 with him to the extent that I didn't find it  
 6 discernible myself.  
 7 Q Okay. And you assume from this that he didn't  
 8 find it was discernible even though he states that  
 9 the stream channel was barely discernible where it  
 10 crosses Highway 27?  
 11 A No, I don't know what he's saying. I just --  
 12 yeah.  
 13 Q And you didn't speak with anyone -- you didn't  
 14 speak with the drafter of this memorandum?  
 15 A No.  
 16 Q And you didn't speak with anyone at the Department  
 17 of Natural Resources about this memorandum?  
 18 A No.  
 19 Q Or anyone who would have been involved in this  
 20 project in 1988?  
 21 A I kind of assumed that nobody would be around.  
 22 Q Perhaps. Okay. And the next document that you  
 23 cite is a 1989 Foth and Van Dyke report entitled  
 24 Wetland Inventory and Assessment.  
 25 A Yes.

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1 Q Okay. And can you tell me who Foth and  
2 Van Dyke -- what Foth and Van Dyke is?  
3 A Foth and Van Dyke is an engineering firm.  
4 Q And they have been -- Are you familiar with their  
5 involvement at the Flambeau Mine site?  
6 A Yes.  
7 Q So at least since March of 1989 they've been  
8 engineers who have worked at the Flambeau Mine  
9 site?  
10 A That's my understanding.  
11 Q And this document, the Wetland Inventory and  
12 Assessment, was that one of the documents that did  
13 identify a drainage -- well, the drainageway as  
14 Stream C?  
15 A No, it did not.  
16 Q Okay. I think you have characterized the document  
17 as referring to headwaters of a tributary to the  
18 intermittent stream designated as C. So is your  
19 criticism of this document not the fact that it --  
20 strike that. Is -- Your criticism of this  
21 document's use of Stream C is that it doesn't  
22 specifically state that there is a Stream C that  
23 goes through the wetland?  
24 A I've said that there is no mention of a waterway  
25 through the wetland because the quote is

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1 "headwaters of a tributary to the intermittent  
2 stream designated as C."  
3 Q Where was Stream C designated in that document?  
4 A It wasn't. I mean it was not designated  
5 upgradient of Copper Park Lane.  
6 Q And that was your reason for including it in the  
7 list of documents that you relied on?  
8 MR. VAN CAMP: Object to the form  
9 of the question.  
10 Q You can answer.  
11 A This Wetland Inventory and Assessment called out  
12 area 5, which is what I was looking at. That's  
13 the portion that I was looking at. And it's in  
14 the area of interest north of where Copper Park  
15 Lane is. So it's similar to Wetland 7 in the  
16 Stantec report. Even though Copper Park Lane  
17 wasn't there at the time, this report  
18 characterizes that wetland as the headwaters of a  
19 tributary to the intermittent stream designated as  
20 C, but there was no mention of any waterway  
21 through that wetland.  
22 Q So you included this as a significant piece of  
23 information in your opinion because of the absence  
24 of it mentioning a waterway through the wetland?  
25 A That's correct.

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1 Q You just mentioned the Stantec report and its  
2 designation of the wetland as W7.  
3 A Yes.  
4 Q If you look at the next bulleted item, Wetland  
5 Delineation Report, Flambeau Mining Company -  
6 Industrial Outlet, City of Ladysmith, Rusk County,  
7 Stantec Consulting, is that the document you're  
8 referring to?  
9 A Yes.  
10 Q And that's been previously marked as an exhibit in  
11 this case as 132. I'll hand you then that  
12 document which has been marked as Exhibit 132.  
13 MS. MC GILLIVRAY: And, Counsel, do  
14 you need a copy of this document?  
15 MR. VAN CAMP: I don't have one  
16 here. Thanks. I'll give it back to you as  
17 soon as we're done.  
18 MR. SAUL: Do you want to swap out  
19 for the --  
20 MS. MC GILLIVRAY: No. You can  
21 hand that one to him. I'll just get it back  
22 from him later.  
23 Q So what I have now shown you as Exhibit 132, is  
24 that the Wetland Delineation Report that you're  
25 referring to?

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1 A That's correct.  
2 Q Okay. And this was actually a document that was  
3 prepared by a colleague of yours at Stantec;  
4 correct?  
5 A Yes.  
6 Q And who is that colleague?  
7 A Jim Engelhardt.  
8 Q And Jim Engelhardt is -- What is his position  
9 description at Stantec, if you know?  
10 A Environmental scientist.  
11 Q Does he report to you?  
12 A No.  
13 Q And this particular report, the Wetland  
14 Delineation Report, Exhibit 132, did you have any  
15 role in preparing this report?  
16 A No.  
17 Q You did review this report, though, in preparation  
18 of your opinions that appear in your expert  
19 report; correct?  
20 A Yes.  
21 Q Okay. And if you would, please, turn to the  
22 figures in Exhibit 132, the Figure 4.  
23 A Yes.  
24 Q You mentioned the wetland delineated as W7. Is  
25 that the wetland that is depicted in this figure?

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1 A Yes, it is.  
 2 Q Okay. And is that the wetland that you've been  
 3 referring to earlier in your deposition today and  
 4 also that you referred to as the wetland under --  
 5 in your report beginning at page 9?  
 6 A Yes.  
 7 Q And you looked at the report from Mr. Engelhardt  
 8 in formulating your opinions in this case;  
 9 correct?  
 10 A Yes.  
 11 Q Mr. Engelhardt finds in his examination of  
 12 wetland 7, wetland W7, that there is a  
 13 well-defined channel with a bed and bank and flows  
 14 south through a culvert under a stub road and then  
 15 to Copper Park Lane. Are you familiar with his  
 16 finding there?  
 17 A Which page?  
 18 Q He discusses this on page WRPC 015458.  
 19 A Okay.  
 20 Q But it's also been summarized in your expert  
 21 report at the bulleted item. Is that correct?  
 22 A Can you ask -- What question are you asking?  
 23 Q Sure. That Mr. Engelhardt found that Stream C  
 24 began to have a defined channel beginning at the  
 25 stub road north of Copper Park Lane and continuing

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1 until the culvert at Copper Park Lane.  
 2 MR. VAN CAMP: Object to the form  
 3 of the question.  
 4 Q You can answer.  
 5 A He says that the waterway does not become visibly  
 6 channelized until it reaches another culvert under  
 7 a short stub road, and then he says south of the  
 8 stub road the waterway is confined to a  
 9 well-defined channel with a bed and bank and flows  
 10 south through another culvert and the waterway  
 11 continues off the studied area. So he says that  
 12 it becomes a well-defined channel there.  
 13 Q And by there, where is there?  
 14 A In between -- south of the stub road.  
 15 Q But before Copper Park Lane; correct?  
 16 A That's correct.  
 17 Q And do you agree with his finding that there is a  
 18 defined channel south of the stub road?  
 19 A I did not observe it myself.  
 20 Q Did you have any discussions with Mr. Engelhardt  
 21 about his finding of a channel south of the stub  
 22 road?  
 23 A Yes.  
 24 Q And did you have those discussions before or after  
 25 you finalized your expert report?

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1 A I had them both before and after.  
 2 Q And having had them before you finalized your  
 3 expert report, did it cause you to change any of  
 4 your conclusions?  
 5 A No.  
 6 Q Did Mr. Engelhardt, if you know, amend his report  
 7 that is -- that has been marked as Exhibit 132  
 8 after having conversations with you about his  
 9 finding that there is a channel south of the stub  
 10 road?  
 11 A No.  
 12 Q I'm going to hand you what's been marked during  
 13 your deposition as Exhibit 169.  
 14 (Videographer Jon Hansen exited the  
 15 proceedings and Videographer  
 16 Connie Hansen entered the  
 17 proceedings)  
 18 MS. MC GILLIVRAY: Counsel, this  
 19 one I do not have an extra copy of it.  
 20 MR. VAN CAMP: Just wait one  
 21 second. We're still on the record, but she's  
 22 going to run and get a copy of that exhibit  
 23 for me, if you don't mind waiting.  
 24 MS. MC GILLIVRAY: I'll wait. Why  
 25 don't we just go off the record then for one

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1 moment.  
 2 VIDEOGRAPHER: Going off the  
 3 record. The time is 12:37.  
 4 (Discussion held off record)  
 5 VIDEOGRAPHER: We are back on the  
 6 record at 12:40.  
 7 MS. MC GILLIVRAY: Thank you.  
 8 Q I have now just handed you what's been marked as  
 9 Exhibit 169, and that is an exhibit that you also  
 10 examined during your deposition on Friday;  
 11 correct?  
 12 A Correct.  
 13 Q Okay. So this is a Foth document that's labeled  
 14 Figure 2, and it has another marking on it which  
 15 is Exhibit 134 but I'd like you to refer to it as  
 16 Exhibit 169 as it was used during your deposition.  
 17 A Certainly.  
 18 Q Okay. Thank you. This is -- And this document  
 19 comes from a larger document entitled the Cooper  
 20 Park Business and Recreation Area Work Plan from  
 21 May 2011, and are you familiar with that document?  
 22 A Yes.  
 23 Q And you, in fact, cite to that document in your  
 24 report at footnote 17; correct?  
 25 A Correct.

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1 Q Okay. So I just want to -- so when we're talking  
2 about where the stub road is and where the Copper  
3 Park Lane is, if we can have some clarity in the  
4 record. The white -- or light blue line that's  
5 depicted on Exhibit 169, is that the wetland  
6 delineation that is the same as W7 on Exhibit 132?  
7 A It appears to be.  
8 Q Okay. And when we're referring to the four  
9 culverts -- or strike that. When you've referred  
10 to the four culverts in your expert report that  
11 you examined, are those shown as the blue line  
12 that crosses Highway 27?  
13 A Yes.  
14 Q The first one. Then there is actually two that  
15 cross a former railroad grade?  
16 A Correct.  
17 Q Okay. And then moving downgradient there is a  
18 short culvert at the stub road; correct?  
19 A Yes.  
20 Q Okay. And then another culvert at Copper Park  
21 Lane; correct?  
22 A Yes.  
23 Q And so the culvert that Mr. Engelhardt was  
24 referring to as having found evidence of channel  
25 south of the stub road is just south of the

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1 culvert up from Copper Park Lane?  
2 A That's correct.  
3 Q Okay. So the other source that you referenced in  
4 your report is a bioassessment of Stream C from  
5 May 24th and 25th, 2005, and we also looked at  
6 that document during your deposition and it was  
7 labeled Exhibit -- I think I have it -- 168. I'm  
8 going to show you that. Thank you. I'm going to  
9 hand you then what's been marked as 168 and ask  
10 you if that's the document that you've referred to  
11 in your expert report.  
12 A Yes. It's an attachment to that.  
13 Q Okay. And so tell me what page, based on the  
14 Bates number in the lower right corner, that the  
15 bioassessment of Stream C that you referenced  
16 begins.  
17 A It begins on 9588.  
18 Q Okay. And what you took as significant from this  
19 document, according to your report, is that the  
20 stream flow upstream of Copper Park Lane is  
21 unchannelized; is that correct?  
22 A Correct.  
23 Q And that is coming from Bates number -- the report  
24 at Bates number FMC 009588?  
25 A That's where it starts, yes. That's where this

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1 bioassessment begins.  
2 Q Okay. And the line that you felt was -- strike  
3 that. The sentence that you felt was significant  
4 begins under the paragraph heading Stream Habitat  
5 and Characteristics?  
6 A I have yet to find it. Oh, yes. It's the first  
7 sentence.  
8 Q And it states, "This stream flow upstream of  
9 Copper Park Lane is unchannelized." And that's  
10 the sentence that you noted in your report;  
11 correct?  
12 A Yes.  
13 Q Okay. The next sentence you did not note in your  
14 report says, "Obvious flow originates from the  
15 wetland area to the north and east, as well as the  
16 biofilter pond." Did you not find that portion of  
17 the stream habitat and characteristics to be  
18 significant in assessing the nature of Stream C?  
19 A No, because I believe that the author is simply  
20 referring to, you know, conveyance of water which  
21 I've referred to as well.  
22 Q Okay. So you would agree with the statement that  
23 "obvious flow originates from the wetland area to  
24 the north and east, as well as the biofilter  
25 pond"?

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1 A There is occasional flow. I don't know how  
2 obvious, and it's not -- hasn't created channels.  
3 Q Okay.  
4 A Because she said that it's unchannelized and  
5 because I didn't see any channels.  
6 Q Did you speak with anyone at Blue Iris  
7 Environmental about this assessment?  
8 A No.  
9 Q In that same section it states, "In May of 2005  
10 Stream C was observed to be continuous in most  
11 places, though sometimes the flow passed through  
12 in-stream debris and sediment. Stream C is  
13 typically passing through a cut channel. The  
14 channel lies between 1 to 3 feet lower than the  
15 surrounding embankment." What -- Did you examine  
16 that part of this report?  
17 A Yes.  
18 Q Okay. And did you rely on that statement at all  
19 in formulating your opinions?  
20 A That refers to the channelized portion which is  
21 south of Copper Park Lane.  
22 Q And that's based on your interpretation of what I  
23 just read; is that right?  
24 A It's based on what this person wrote in here.  
25 Q Okay.

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1 A They started out saying that the stream flow  
 2 upstream of Copper Park Lane is unchannelized and  
 3 then they start -- then they talked about kind of  
 4 the nature of the drainageway north of there and  
 5 then they started talking about the upper reaches  
 6 of the channelized portion is characterized by and  
 7 then they're moving downstream from there.  
 8 Q Okay. At the very beginning of the paragraph the  
 9 author refers to an industrial outlot and  
 10 associated parking lot, reclaimed rail line and  
 11 biofilter pond drain into Stream C and uses the  
 12 label Stream C. Did you consider that when you  
 13 were -- that sentence when you were formulating  
 14 your opinions?  
 15 A To a certain extent, yes.  
 16 Q And what information did you think was significant  
 17 about that sentence?  
 18 A In all of these documents that I looked at, I was  
 19 trying to determine whether others had seen  
 20 evidence of a defined and continuous channel,  
 21 primarily in the area directly adjacent to the  
 22 biofilter overflow. This did not indicate that  
 23 that was the case.  
 24 Q Okay. So your criticism -- well, strike that.  
 25 Your distinction of between what this report says

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1 and what your opinions are is that they use the  
 2 term Stream C whereas you would refer to Stream C  
 3 as a drainageway; is that --  
 4 A Yes. I would refer to it as simply that monicker  
 5 that's been placed on that conveyance system.  
 6 Q If the sentence were changed to an industrial  
 7 outlot and associated parking lot and reclaimed  
 8 rail line and biofilter pond drain into a  
 9 drainageway known as Stream C, would you agree  
 10 with that sentence?  
 11 A No. I would change it to drain toward.  
 12 Q Drain toward the drainageway known as Stream C?  
 13 A Yes.  
 14 Q Okay. And is that because you did not observe  
 15 during your visit on October 18th, 2011, flow from  
 16 the biofilter to the lowest point of the  
 17 drainageway?  
 18 A No. It's because I didn't observe evidence of it  
 19 at that time.  
 20 Q At the time of your inspection?  
 21 A Correct.  
 22 Q Okay. The last sentence in this -- in that  
 23 paragraph says, "Stream C flows under Copper Park  
 24 Lane from the north and takes a meandering  
 25 southwest direction through a woodland, this

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1 confluence of the Flambeau River immediately south  
 2 of the point where Meadowbrook Creek also enters  
 3 the Flambeau River." Did you consider the fact  
 4 that this author at least has stated that Stream C  
 5 flows north of Copper Park Lane?  
 6 A Again, this person is doing a bioassessment of a  
 7 water resource feature. They're not using --  
 8 they're not distinguishing between the terminology  
 9 that's used for making jurisdictional  
 10 determinations. So they're not -- you know, you  
 11 can pick out certain words from here that sound  
 12 like the same words that I am using and that the  
 13 regulators are using, but they aren't used with  
 14 the same level of discipline that one would use in  
 15 doing that in a regulatory determination.  
 16 Q Okay. Those are the documents that you've listed  
 17 on pages 4 and 5.  
 18 A Uh-huh. Yes.  
 19 Q And as far as your opinions relative to the nature  
 20 of Stream C, those are the only documents that you  
 21 reviewed; correct?  
 22 A Relative to Stream C. Yes.  
 23 Q And you note elsewhere that there are other  
 24 documents -- well, let's find the place in your  
 25 report. You state that many other -- recorded

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1 observations of other professionals have found --  
 2 Let me be able to direct you to your quotation so  
 3 that we're all in the same place. Okay, thanks.  
 4 It's at page 7.  
 5 A Okay.  
 6 Q Where you say, "Many materials prepared by FMC or  
 7 its consultants did, in fact, note that the  
 8 biofilter would discharge to 'Stream C.'"  
 9 A Correct.  
 10 Q What are the many materials prepared by FMC or its  
 11 consultants that you're referring to?  
 12 A I am referring to the documents that I've listed  
 13 on page 4 and 5, and I believe -- yes. And,  
 14 you know, I've listed on page 4 and 5 specific  
 15 portions of documents that in their entirety are  
 16 referenced in footnotes. For instance on page 5,  
 17 footnote 17, Copper Park Business and Recreation  
 18 Area Work Plan, Appendix C. So this Wetland  
 19 Delineation Report is in Appendix C, but I have  
 20 also looked through the Copper Park Business and  
 21 Recreation -- Business and Recreation Area Work  
 22 Plan to find that, and as I was looking through  
 23 that, it's those documents that I saw over and  
 24 over, you know, maps that were listed where it  
 25 said Stream C in the area that we're talking

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1 about.  
2 Q Okay. For example, you just I think indicated  
3 that Exhibit 169 is one such document?  
4 A 169 is one of the many documents that is shown  
5 within the document that I have referenced in  
6 footnote 17.  
7 Q Okay. And footnote 17 refers to the Foth May 2011  
8 work plan; correct?  
9 A That's correct.  
10 Q Looking at Exhibit 169, it contains -- it depicts  
11 an intermittent stream as a dotted blue -- as a  
12 blue line along -- through the wetland; correct?  
13 A It does, yes.  
14 Q Okay. And if I understand your testimony  
15 correctly, you agree with the general path -- the  
16 general flow path of the drainageway as depicted  
17 on 169 but not the designation of that flow path  
18 as an intermittent stream north of Copper Park  
19 Lane; is that correct?  
20 A I agree with there being a conveyance of water  
21 from east of Highway 27 through the outlot and  
22 down south of Copper Park Lane, yes, but I don't  
23 agree that it's an intermittent stream per se.  
24 Q An intermittent stream north of Copper Park Lane  
25 or an intermittent stream at all?

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1 A North of Copper Park Lane.  
2 Q Okay. I just wanted to make sure that -- The term  
3 Stream C has been used so much, I wanted to be  
4 sure we were talking about the same thing.  
5 A I know.  
6 Q We also talked about this at your deposition, but  
7 there is also a directional line moving from the  
8 0.98 acre biofilter basin toward the wetland. Do  
9 you see that line?  
10 A Yes.  
11 Q And you agree with the directional flow as  
12 depicted by that arrow; correct?  
13 A That would be the direction of flow, yes.  
14 Q Okay. And would you agree that the wetland drains  
15 towards its lowest point in that wetland?  
16 A I'm not sure what you're asking.  
17 Q Okay. I'll just ask you it this way: Would  
18 flow -- If there was a sufficient flow from the  
19 biofilter in the wetland, would it follow the path  
20 of the drainageway?  
21 MR. VAN CAMP: I'm going to object  
22 to the form of the question.  
23 Q If you understand, you can answer.  
24 A I don't. Could you restate it?  
25 Q Sure. Sure. If there -- If there was flow from

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1 the biofilter to the wetland, would that flow go  
2 in the direction towards the drainageway?  
3 A It would go to the lowest -- I mean it would go  
4 from the highest to the lowest point if there were  
5 surface water flow.  
6 Q And the lowest point is -- in that wetland is what  
7 you're referring to as the drainageway known as  
8 Stream C; correct?  
9 A Generally, yes.  
10 Q By generally -- I just want to understand what  
11 distinction you would put on that. I understand  
12 your testimony to be that while there is not a  
13 defined stream east of the biofilter, there is a  
14 drainageway that flows in a southwesterly  
15 direction?  
16 MR. VAN CAMP: I object to the form  
17 of the question.  
18 A There is -- When I say drainageway, I am referring  
19 to the entire area that conveys water. I haven't  
20 been able to find an obvious place to trace. I  
21 mean even this line, the position of this line on  
22 Exhibit 169 is a very randomly placed line you can  
23 tell just by observing the underlying base map.  
24 Q If we had a topographical map that shows  
25 depreciations in the surface, would we be able to

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1 identify the lowest point in the drainageway?  
2 A Yes.  
3 Q The lowest point in the wetland that way?  
4 A Yes.  
5 Q Okay. And assuming we could identify that through  
6 such topographical maps, would flow into the  
7 wetland follow that lowest point through the  
8 drainageway?  
9 MR. VAN CAMP: Object to the form  
10 of the question.  
11 A It just isn't that -- The reason I say generally  
12 yes is because, you know, there is never just one  
13 way for things to flow in an area such as this  
14 that's particularly undefined as to its channel.  
15 It's depends on how much flow is occurring at the  
16 time. If there is very little flow, it might go  
17 one way. If there is a lot of flow, it might go  
18 the other way.  
19 Q Okay. Now to further try to understand what your  
20 testimony is, you just stated that water is  
21 conveyed generally down -- or generally  
22 downgradient in the drainageway; correct?  
23 A That's correct, from upgradient to downgradient.  
24 Q Okay. What do you mean by conveys, water is  
25 conveyed?

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1 A Moves from one place -- one area to another area.  
2 Q Would it also mean flows?  
3 A Yeah, but not necessarily in a concentrated  
4 channel. So it could be in a sheetflow kind of  
5 situation so --  
6 Q Okay.  
7 A We're talking about the minutia here but that's  
8 because there is so little water that we're  
9 talking about that it isn't predictable the way  
10 that it moves.  
11 MS. MC GILLIVRAY: I'm going to  
12 strike that last part as nonresponsive.  
13 Okay.  
14 MR. VAN CAMP: Well, I'm going to  
15 ask that it not be stricken, and you may ask  
16 a Court later if you want.  
17 Q Moving on then to the wetland depicted on  
18 Exhibit 169, you agree that some amount of water  
19 moves or is conveyed from the biofilter to the  
20 wetland; correct?  
21 A Yes.  
22 Q We also talked about this at your deposition, so I  
23 apologize for the redundancies. Are you familiar  
24 with the term adjacent wetland?  
25 A Yes.

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1 Q And what does an adjacent wetland mean?  
2 A It means that it's bordering, contiguous or  
3 neighboring a water of the U.S.  
4 Q Okay. And so there is a culvert at Copper Park  
5 Lane and then what has been agreed by the parties  
6 as Stream C south of Copper Park Lane?  
7 MR. VAN CAMP: I'll object to the  
8 form of the question.  
9 MS. MC GILLIVRAY: Strike. I'll  
10 rephrase. Thank you.  
11 Q There is a culvert crossing Copper Park Lane, and  
12 Stream C flows below that point. Do you agree?  
13 A Correct.  
14 Q Okay. If Stream C south of Copper Park Lane has  
15 been found to be a water of the United States,  
16 would you agree that the wetland that is  
17 designated in Exhibit 169 is an adjacent wetland?  
18 MR. VAN CAMP: Object to the form  
19 of the question.  
20 A It hasn't been determined to be a water of the  
21 U.S.  
22 Q Okay. I'm going to ask you to assume, without  
23 agreeing with me, that Stream C has been found to  
24 be a water of the U.S.  
25 A Okay. Assuming.

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1 Q Assuming that hypothetical, do you agree that the  
2 wetland depicted on Exhibit 169 is an adjacent  
3 wetland to Stream C south of Copper Park Lane?  
4 MR. VAN CAMP: Object to the form  
5 of the question.  
6 Q You can answer.  
7 A The definition of adjacent is bordering,  
8 contiguous or neighboring a water of the U.S. If  
9 we are to assume that the waterway downstream of  
10 Copper Park Lane is a water of the U.S., then the  
11 wetland north of Copper Park Lane, which is  
12 connected via a culvert under a manmade berm, is  
13 probably considered -- is routinely considered,  
14 what's it called, neighboring by the Corps of  
15 Engineers.  
16 Q I'm going to hand you what's been marked as  
17 Exhibit 165, which is the 2008 guidance; correct?  
18 A Yes.  
19 Q Okay. And if you would in that guidance turn to  
20 page 5.  
21 A I'm on page 5.  
22 Q Okay. And is your understanding of the definition  
23 of adjacency from this guidance document?  
24 A In part, yes.  
25 Q So if you look at the paragraph that is -- that

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1 begins "The regulations define adjacent as  
2 follows: The term adjacent means bordering,  
3 contiguous or neighboring wetlands separated from  
4 other waters of the United States by manmade  
5 ditches or barriers, natural river berms, beach  
6 dunes and the like are adjacent wetlands."  
7 A It actually says dikes, not ditches, but --  
8 Q Oh. I appreciate that correction. With that  
9 correction, is that the basis of your  
10 understanding of what adjacent water means?  
11 A That is.  
12 Q Okay. Applying that definition, and again  
13 assuming for purposes of this deposition that  
14 Stream C has been determined to be a water of the  
15 United States, do you agree that this is -- this  
16 wetland depicted on 169 is adjacent?  
17 MR. VAN CAMP: Object to the form  
18 of the question.  
19 Q You can answer.  
20 A It's sounding like now you're saying that the  
21 stream south of Copper Park Lane has been  
22 determined, and I don't agree that it has been  
23 determined.  
24 Q Okay.  
25 A So are we still assuming?

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1 Q It's my hypothetical here for you. Assuming, and  
 2 even though I know you're taking a position with  
 3 whether or not this has been determined  
 4 sufficiently to be a water of the United States  
 5 based on your review of plaintiffs' documents;  
 6 correct?  
 7 A I have to say I'm a little bit uncomfortable being  
 8 in this neighborhood of assuming things.  
 9 Q Okay. Well, at deposition on Friday do you recall  
 10 being -- we had a discussion about adjacency and  
 11 what that means as far as wetlands being adjacent  
 12 to waters of the United States?  
 13 A Do I recall it, yes.  
 14 Q Okay. And at that deposition you were asked, So  
 15 if there has been a determination that Stream C  
 16 south of Copper Park Lane is a water of the U.S.,  
 17 yes was your answer, then the wetland that is  
 18 delineated on Exhibit 169 would be an adjacent  
 19 wetland, and you responded yes, but that hasn't  
 20 been done. Has your answer -- Has your testimony  
 21 changed at all since you provided that on Friday?  
 22 A No.  
 23 Q Okay. So your contention with my question is  
 24 that you don't agree that there has been a  
 25 determination that Stream C south of Copper Park

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1 Lane is a water of the United States?  
 2 A That's correct.  
 3 Q Okay. And if I just ask you to assume that to be  
 4 true without agreeing with me, then you would  
 5 agree that wetland -- the wetland depicted in 169  
 6 is an adjacent wetland?  
 7 A I believe I answered that in the affirmative  
 8 already. Yes.  
 9 Q Okay. Thank you. Turning back to your report,  
 10 today during your deposition you discussed what  
 11 you called a significant nexus test and criticized  
 12 the plaintiffs for not having adequately conducted  
 13 one; correct?  
 14 A Yes. Correct.  
 15 Q Okay. What I want to understand is what you mean  
 16 by a significant nexus test.  
 17 A Well, I guess I would take you back to the  
 18 Exhibit 171 which essentially walks a person  
 19 through pulling all the information together that  
 20 is necessary for that significant test --  
 21 significant nexus test to occur if, in fact, you  
 22 get to the point of needing a significant nexus  
 23 determination.  
 24 Q And so your testimony is that plaintiffs have not  
 25 adequately presented evidence in order to conduct

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1 a significant nexus test as far as the drainageway  
 2 known as Stream C to the Flambeau River; correct?  
 3 A Correct.  
 4 Q You didn't conduct a significant nexus analysis  
 5 yourself; correct?  
 6 A I did not.  
 7 Q And you don't have an opinion whether or not there  
 8 is a significant nexus of the drainageway known as  
 9 Stream C to the Flambeau River; correct?  
 10 A I did not do that analysis.  
 11 Q So you don't have an opinion whether or not there  
 12 is a significant nexus of the drainageway known as  
 13 Stream C to the Flambeau River?  
 14 A I need to look at my -- I'm trying to remember if  
 15 I made that conclusion or not.  
 16 Q And are you now referring to what's been marked as  
 17 Exhibit 164, your report?  
 18 A Yes.  
 19 Q Okay.  
 20 A I don't believe that I have -- I don't have an  
 21 opinion on whether a significant nexus exists.  
 22 There are disconnections in the line of reasoning  
 23 that haven't been filled with the documentation  
 24 that's required to do a significant nexus  
 25 determination, to make that determination.

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1 Q And when you're talking about the documentation  
 2 necessary, you would agree that the jurisdictional  
 3 determination form that is Exhibit 171 is just one  
 4 form -- one method of conveying that information.  
 5 It's not a necessary form?  
 6 A That's correct.  
 7 Q And the information that you reviewed in  
 8 formulating your opinion about the sufficiency  
 9 of plaintiffs' evidence is limited to the  
 10 complaint, Nauta's -- Mr. Nauta's expert report  
 11 from October 2011 and Dr. Chambers' expert report  
 12 from October 2011; correct?  
 13 A I also reviewed the declaration -- I didn't  
 14 mention this before but I think I mentioned it in  
 15 the deposition, Dr. -- or Mr. Coleman's  
 16 declaration.  
 17 Q Was that before or after you finalized your expert  
 18 report?  
 19 A I think it was after it because I think it was a  
 20 later declaration, but I'm not positive.  
 21 Q Okay. And who is Dr. Coleman?  
 22 A One of the plaintiffs' expert witnesses, I  
 23 believe.  
 24 Q Do you know who he is other than one of  
 25 plaintiffs' experts? Do you know where he works?

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1 A He works for some Native American agency.  
2 Q And is he -- Do you know what his scientific  
3 background is?  
4 A I've reviewed it briefly when looking at his  
5 declaration.  
6 Q Okay. And the declaration that you're referring  
7 to, is it a declaration that was prepared by  
8 Dr. Coleman for this litigation?  
9 A Yes.  
10 Q And do you recall if in that declaration he  
11 provided his firsthand observations of stream  
12 flow -- excuse me, of flow from the biofilter to  
13 the drainageway known as Stream C?  
14 A Yes, I recall him discussing that.  
15 Q And I think the timeline is that you reviewed that  
16 after you finalized your report. Given  
17 Dr. Coleman's firsthand observations of such flow,  
18 did that cause you to reevaluate any of your  
19 opinions that you gave in your expert report?  
20 A No.  
21 Q And did you just disregard his first -- his  
22 personal firsthand observations of flow from the  
23 biofilter to the drainageway?  
24 A No.  
25 Q What did you do with that information, if

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1 anything?  
2 A It lacked information with regard to frequency of  
3 those occurrences.  
4 Q Dr. Coleman provided the days in which he saw  
5 flow; correct?  
6 A Yes.  
7 Q And for frequency -- what is your criticism  
8 regarding frequency then?  
9 A I believe the times that he -- if you were to  
10 assume that the only times that flow occurred was  
11 when he was there and saw it, then that's not  
12 highly frequent flow.  
13 Q Okay. So there is absence of evidence of  
14 frequency of flow in your mind from Dr. Coleman's  
15 observations?  
16 A There is absence of evidence of frequency outside  
17 the times that he was physically there, yes.  
18 Q Would you agree, though, that it does provide  
19 evidence of some amount of flow from the biofilter  
20 to the drainageway?  
21 A Yes. Or some amount of flow anyway from the  
22 biofilter into the wetland.  
23 Q Did Dr. Coleman in your recollection make a  
24 distinction between the wetland and the  
25 drainageway?

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1 A I'd have to review his declaration.  
2 Q Okay. So --  
3 A But I don't recall that he made that distinction,  
4 no.  
5 Q So his observations -- Just sitting here today,  
6 you can't recall what he particularly observed?  
7 A Not in every regard, no.  
8 Q On those specific days in which he stated there  
9 that he observed flow from the biofilter to the  
10 drainageway known as Stream C, do you have any  
11 reason to dispute his firsthand observations?  
12 A I didn't get that impression that he saw water  
13 running directly into what would be the lowest --  
14 directly and continuously running into what would  
15 be the lowest point of that wetland. I would be  
16 happy to look through it now to make that  
17 determination.  
18 Q Is that based on your review of the declaration or  
19 based on conversations that you had with  
20 Dr. Coleman?  
21 A Review of the declaration.  
22 Q So I think we started off in a more concrete  
23 question and went afield. Your -- I just want to  
24 make sure I understand this correctly. Your  
25 criticisms of plaintiffs for not having presented

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1 sufficient evidence of a significant nexus between  
2 the drainageway and the Flambeau River is based on  
3 your review of the complaint, Dr. Chambers'  
4 report, Mr. Nauta's report and Mr. Roesler's  
5 deposition transcript; is that correct?  
6 A Yes.  
7 Q Okay. And who is Mr. Roesler?  
8 A I believe he's a DNR employee.  
9 Q Okay. You didn't anywhere in your report  
10 reference Mr. Roesler's deposition transcripts,  
11 did you?  
12 A I thought it was in a sub -- it looks like I  
13 didn't.  
14 Q Do you recall any information from Mr. Roesler's  
15 deposition transcript that you thought was  
16 significant in formulating your opinions?  
17 A To tell you the truth, I read it somewhat in a  
18 cursory manner. It was really long, and after  
19 looking at some of it I realized that it didn't  
20 seem like it was going anywhere that was going to  
21 lead me to any conclusions, so I would have to say  
22 I didn't review it very carefully.  
23 Q So would it be fair then that you didn't rely on  
24 it in formulating your opinions?  
25 A That would be a fair statement.

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1 Q Okay. And to kind of keep winding around on  
2 different topics here, I asked you if you had --  
3 if your criticism of plaintiffs for not presenting  
4 sufficient evidence of a significant nexus between  
5 the drainageway and the Flambeau River were on the  
6 sources that we've now mentioned as the complaint,  
7 Dr. Chambers' report and Mr. Nauta's report;  
8 correct?  
9 A Correct.  
10 Q And since you didn't rely on Mr. Roesler's  
11 deposition transcript, your opinion based on the  
12 sufficiency of their significant analysis evidence  
13 is based on those three sources; correct?  
14 A And certainly on Mr. Coleman's -- oh, that's  
15 right. For my expert report, you're saying?  
16 Q Correct.  
17 A Yes, just those three.  
18 Q Okay. And would the same be true, that you relied  
19 on the complaint, the Nauta report and the  
20 Chambers report for your opinion that plaintiffs  
21 have not provided sufficient evidence of a  
22 significant nexus between the biofilter outflow  
23 and the Flambeau River?  
24 A That's correct.  
25 Q Same question as it would apply to the wetland

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1 adjacent to the biofilter. The same three  
2 sources, the complaint and the two expert reports  
3 from plaintiffs?  
4 A Can you frame the question?  
5 Q Sure. In your criticism of plaintiffs for not  
6 presenting sufficient evidence to show a  
7 significant nexus between the wetland and the  
8 Flambeau River, you relied on three sources only,  
9 which are the complaint, the Chambers report and  
10 the Nauta report; correct?  
11 A That's correct.  
12 Q Okay. And I think we talked about this for the  
13 drainageway, but I'm just going to make sure that  
14 I have the complete record for all of the water  
15 resources that you examined. You did not conduct  
16 a significant analysis -- a significant nexus  
17 analysis of the biofilter's outflow and the  
18 Flambeau River; correct?  
19 A Correct.  
20 Q You didn't conduct a significant nexus analysis of  
21 the wetland and the Flambeau River; correct?  
22 A Correct.  
23 Q You didn't conduct a significant nexus analysis  
24 of the drainageway known as Stream C and the  
25 Flambeau River; correct?

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1 A Correct.  
2 Q And for the portion south of Copper Park Lane you  
3 did not conduct a significant nexus analysis  
4 between Stream C and the Flambeau River; correct?  
5 A That is correct.  
6 Q Okay. So you have -- For those four water  
7 resources, the wetland, the biofilter outflow, the  
8 drainageway known as Stream C, and the Stream C  
9 south of Copper Park Lane, you have no opinion  
10 whether or not there is a significant nexus to the  
11 Flambeau River; correct?  
12 A That's correct because I haven't performed that.  
13 Q Okay. Earlier in your deposition today you  
14 referred to a mass balance analysis. Do you  
15 recall that testimony?  
16 A Yes.  
17 Q Okay. What is a mass balance analysis?  
18 A It simply looks at a combination of concentration  
19 of a constituent in water combined with the  
20 overall quantity of the water moving from one  
21 place to another, and also, once you know that,  
22 you can compare it with the amount of same in the  
23 receiving water.  
24 Q And you didn't conduct a mass balance analysis for  
25 this case; correct?

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1 A That's correct.  
2 Q Okay. And a mass balance analysis is one way to  
3 examine whether or not there is a significant  
4 nexus; correct?  
5 A It's one small component of what would be required  
6 for a significant nexus.  
7 Q Okay. And as far as -- strike that. It is not a  
8 required methodology to prove significant nexus by  
9 applying a mass balance analysis; correct?  
10 A Correct.  
11 Q In your opinion it's a useful tool but it's not a  
12 mandatory tool; correct?  
13 A It's not the only tool that could be used.  
14 MS. MC GILLIVRAY: Maybe we could  
15 take a short break.  
16 VIDEOGRAPHER: Going off the  
17 record. The time is 1:26. End of DVD 3.  
18 (Recess)  
19 VIDEOGRAPHER: We are back on the  
20 record with DVD number 4. The time is 1:38.  
21 Q Ms. Day, in the final line of questions I have for  
22 you, I'm wondering if you have plans to travel  
23 outside of the United States during the month of  
24 May.  
25 A Yes, as a matter of fact.

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1 Q Okay. And what days will you be out of the  
 2 United States?  
 3 A The 20th of May through the 1st of June.  
 4 Q And when did you make those travel arrangements?  
 5 A I was putting those plans together, I don't know,  
 6 probably since last -- the end of last summer.  
 7 Q And are they plans that were made at the request  
 8 of anyone associated with the Flambeau Mining  
 9 Company?  
 10 A No.  
 11 MS. MC GILLIVRAY: No further  
 12 questions. Thank you.  
 13 MR. VAN CAMP: You're finished  
 14 then?  
 15 MS. MC GILLIVRAY: I am.  
 16 MR. VAN CAMP: Okay. Well,  
 17 interesting that you anticipated. I was  
 18 going to ask the witness not as part of her  
 19 testimony but so that it was a matter of the  
 20 record if she would briefly tell us why she  
 21 won't be available to testify at trial.  
 22 Could you just tell us what's going on at  
 23 that time and, you know, we'll put it on the  
 24 record, and then we'll be finished.  
 25 THE WITNESS: Okay. Yeah, my

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1 husband and I have assembled ten other -- ten  
 2 dear friends and we are going kind of on an  
 3 anniversary trip, multiple people's  
 4 anniversaries, to Croatia to go biking along  
 5 the Dalmatian Coast. So, yeah, we've been  
 6 planning it for quite awhile, as you might  
 7 imagine.  
 8 MR. VAN CAMP: So anyway, with  
 9 that --  
 10 MS. MC GILLIVRAY: Thank you for  
 11 sharing that.  
 12 MR. VAN CAMP: With that on the  
 13 record, I have no further questions. Once  
 14 again, I would like to thank you very much  
 15 for making yourself available for this  
 16 deposition. So I think we're adjourned.  
 17 MS. MC GILLIVRAY: Thank you.  
 18 MR. VAN CAMP: Thank you.  
 19 THE WITNESS: Thank you.  
 20 VIDEOGRAPHER: We're off the  
 21 record. End of deposition. The time is  
 22 1:40.  
 23 (Adjourning at 1:40 p.m.)  
 24  
 25

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1 STATE OF WISCONSIN )  
 ) ss.  
 2 COUNTY OF DANE )  
 3 I, PEGGY S. CHRISTENSEN, a Registered Professional  
 4 Reporter and Notary Public duly commissioned and  
 5 qualified in and for the State of Wisconsin, do  
 6 hereby certify that pursuant to notice and  
 7 stipulation, there came before me on the 18th day of  
 8 April 2012, at 9:04 in the forenoon, at the offices  
 9 of DeWitt Ross & Stevens S.C., Attorneys at Law,  
 10 Two East Mifflin Street, Suite 600, City of Madison,  
 11 County of Dane, and State of Wisconsin, the following  
 12 named person, to wit: ELIZABETH A. DAY, who was by  
 13 me duly sworn to testify to the truth and nothing but  
 14 the truth of her knowledge touching and concerning  
 15 the matters in controversy in this cause; that  
 16 ELIZABETH A. DAY was thereupon carefully examined  
 17 upon her oath and her examination reduced to  
 18 typewriting with computer-aided transcription; that  
 19 the deposition is a true record of the testimony  
 20 given by the witness; and that reading and signing  
 21 was not waived.  
 22 I further certify that I am neither  
 23 attorney or counsel for, nor related to or employed  
 24 by any of the parties to the action in which this  
 25 deposition is taken and further that I am not a

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1 relative or employee of any attorney or counsel  
 2 employed by the parties hereto or financially  
 3 interested in the action.  
 4 In witness whereof I have hereunto set my  
 5 hand and affixed my notarial seal this 24th day of  
 6 April 2012.  
 7  
 8  
 9 Notary Public, State of Wisconsin  
 10 Registered Professional Reporter  
 11 Certified Realtime Reporter  
 12 My commission expires  
 13 August 19, 2012  
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